00087177

BOMBAY BRANCH
OF THE
ROYAL ASIATIC SOCIETY.
TOWN HALL, BOMBAY.

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018

ERRATA.

Page 2 line 22 *for* or *read* is.

„ 8 „ 42 „ overturned *read* occasioned.

„ 10 „ 4 „ Act *read* Acts.

„ 10 „ 22 „ Statutes *read* Statute.

„ 12 „ 4 „ an *read* a.

„ 34 „ 31 „ testator *read* devisees.

„ 34 „ 39 „ is *read* was.

„ 54 „ 24 Bracket before the word executor and bracket after the parenthesis.

„ 56 „ 23 „ Machelder *read* Macheldey.

00087177

87177

SECTIONS.

Power to apply property of minors, &c., for their maintenance, &c. 41
Power to give receipts 42
Power to compound, &c. 43
Power to several trustees of whom one disclaims or dies ... 44
Suspension of trustee's powers by decree... 45

CHAPTER V.

OF THE DISABILITIES OF TRUSTEES.

Trustee cannot renounce after acceptance... 46
Trustee cannot delegate... 47
Co-trustees cannot act singly 48
Control of discretionary power 49
Trustee may not charge for services 50
Trustee may not use trust-property for his own profit ... 51
Trustee for sale or his agent may not buy 52
Trustee may not buy beneficiary's interest without permission 53
Trustee for purchase 53
Co-trustees may not lend to one of themselves 54

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

Rights to rents and profits 55
Right to specific execution 56
Right to transfer of possession 56
Right to inspect and take copies of instrument of trust, accounts, &c. 57
Right to transfer beneficial interest 58
Right to sue for execution of trust 5
Right to proper trustees... ... ...
Right to compel to any act of duty ... ...
Wrongful purchase by trustee ... ...
... trust-property into the hands of third persons;—
... been converted. ... ...
... ...

SECTIONS.

Liability of beneficiary joining in breach of trust 68
Rights and liabilities of beneficiary's transferee 69

CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE.

Office how vacated 7
Discharge of trustee 7
Petition to be discharged from trust 7
Appointment of new trustees on death, &c. 7
Appointment by Court... 7
Rules for selecting new trustees 7
Vesting of trust-property in new trustees... 7
Powers of new trustees... 7
Survival of trust 7

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

Trust how extinguished... ... ...
Revocation of trust ... ...
Revocation not to defeat what trustees have duly done ...

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Where obligation in nature of trust is created 8
Where it does not appear that transferor intended to dispose of beneficial interest 8
Transfer to one for consideration paid by another... ... 8
Trust incapable of execution or executed without exhausting trust-property 8
sfer for illegal purpose 8
st for illegal purpose ... ...
t of which revocation is prevented by coercion
pursuant to rescindable con
coming credi

SECTION.

Purchase by person contracting to buy property to be held on trust 92
Advantage secretly gained by one of several compounding creditors 93
Constructive trusts in cases not expressly provided for ... 94
Obligor's duties, liabilities and disabilities 95
Saving of rights of *bonâ fide* purchasers 96
THE SCHEDULE.

APPENDIX.

PAGE.

Official Trustee Act No. XVII of 1864 201
The Indian Trustee Act No. XXVII of 1866, ... 211
The Trustees and Mortgagees' Powers Act No. XXVIII of 1866 233
Form of Conveyance of an Estate in India, &c. 252
Plaint and Prayer for the Execution of Trusts, ... 254
Indian Penal Code Act No. XLV of 1860, Sections 405—408... 256

TABLE OF CASES CITED.

ABERAMAN Iron Works, 197
Aberdeen Town *v.* University, 193
Abouloff *v.* Oppenheimer, 27
Ackroyd *v.* Smithson, 147
A. C. R. Chowdhry *v.* P. M. Guho, 113
Addington *v.* Cann, 34
A. G. *v.* Brackenbury, 146
A. G. *v.* Glegg, 107
A. G. *v.* Great Eastern, 7
—— *v.* Kohler, 75
—— *v.* Lady Downing, 146
—— *v.* Lazar, 41
—— *v.* Wilson, 86
Aleyn *v.* Belitner, 145
Ali *v.* Ali, 140
Allcard *v.* Skinner, 189
Allen *v.* Jackson, 24
Alleston *v.* Chichester, 116
Ambrose Lake, 182
Andley *v.* Chetham, 178
Appleby *v.* Myers, 158
Appovier *v.* R. S. Aiyan, 4
Armstrong *v.* Armstrong, 151, 160
Ashabai *v.* Haji, 32
Ashbee *v.* Kempson, 122
Ashwell *v.* Lorni, 191
Atkinson *v.* Denby, 86
Atkyns *v.* Hunter, 187
Austin *v.* Tawney, 142
Ayerst *v.* Jenkins, 23
Aylesford *v.* Morris, 195, 196

BALROCH *v.* Lawson, 159
Baddeley *v.* Baddeley, 43
Bain *v.* Sadler, 63
Banda Booty, 5
Banks *v.* Goodfellow, 48
Barnard *v.* Hunter, 114
Barnes *v.* Addy, 54, 57
Barnhart *v.* Greenshield, 115
Barton *v.* Muir, 23
Bassett *v.* Nosworthy, 115
Batston *v.* Salter, 153
Bell *v.* Cureton, 140
—— *v.* Turner, 73
Bence *v.* Gilpur, 14
Bennett *v.* Bennett, 153
Benyon *v.* Nettlefield, 23
Berlin Steam, 124
Bethell *v.* Abraham, 68, 75
Bill *v.* Cureton, 106
Birt *v.* Birt, 123
Blackett *v.* Bates, 160
Blandy *v.* Widmore, 39
B. Maneckbai *v.* B. Merbai, 9
Bonney *v.* Ridgard, 137
Booth *v.* Coulton, 67
Boughton *v.* Knight, 48
Bowman *v.* Rostron, 42
B. Palnai *v.* M. Meah, 115
Bradford *v.* Romney, 170
B. Rao *v.* P. Mal., 137
Breton's Estate, 43
Brice *v.* Stokes, 85
Brier *v.* Brier, 93
Briggs *v.* Penny, 36, 40, 41
—— *v.* Massey, 114
Brook *v.* Haynes, 15, 42
Brown *v.* Adams, 129
—— *v.* Burdett, 24
—— *v.* Gellatly, 67
—— *v.* Savage, 95
Brumfit *v.* Norton, 142
Budge *v.* Gummow, 73
Bulkeley *v.* Stephens, 69
Buller *v.* Carter, 179
Burdick *v.* Garrick, 79, 82, 179
Burniss *v.* Getting, 74
Burrows *v.* Gore, 82
Burns *v.* Holker, 186
Bursott *v.* Savage, 115
Burt's Estate, 107

Butler *v.* Butler, 81, 82
——— *v.* Carter, 83
——— *v.* Cumpston, 180

Caballero *v.* Henty, 115
Cadell *v.* Palmer, 17
Cadett *v.* Earle, 74
Camden *v.* Murray, 52
Campbell *v.* Campbell, 86
Cannock Co., 94
Carron Co. *v.* Maclaren, 25
Carter *v.* Carter, 41
Caton *v.* Caton, 165
Cavendish *v.* Geaves, 114
Chadwick *v.* Turner, 142
Chalmer *v.* Bradley, 137
Chambers *v.* Smith, 20
Charlton *v.* Durham, 82
Chesterfield's Trusts, 67
Chesterfield *v.* Janssen, 144, 195
Childers *v.* Childers, 24
Chor *v.* Chanby, 139
Chottoo *v.* Misser, 71
Clarke *v.* Hilton, 147
Clay and Tetley, 101
Clough *v.* Bond, 107
Clowes *v.* Higginson, 167
——— *v.* Martineau, 182
Cockburn *v.* Peel 68
Cohen *v.* Waley, 68
Coles *v.* Trecothick, 174
Collinson *v.* Lister, 74
——— *v.* Patrick, 42
Cooper's Contract, 96
Cooper *v.* Cooper, 90
——— *v.* Phibbs, 167, 186
Cornfoot *v.* Fowke, 16
Corser *v.* Cartwright, 100
Costello *v.* O'Rorke, 108
Crook *v.* Brooking, 36
Croskell *v.* Bower, 178
Crowe *v.* Ballard, 174
Cuff *v.* Hall, 67

Dance *v.* Goldingham, 95, 120
Daniel *v.* Arkwright, 170
Davies *v.* Otty, 23
Dawson *v.* Hearne, 112
——— *v.* Small, 23, 155
Day *v.* Blennerhasset, 175
D. d. Butcher *v.* Musgrove, 42
D. D. Pandey *v.* Dibiah, 151
De Bussche *v.* Alt., 79, 80, 105, 181
Dendy *v.* Cary, 170
De Salle *v.* Moorat, 67
Dharani *v.* Kristo 154
Dhonender *v.* Mully, 177
Dobbs *v.* Tuke, 90
Doss *v.* Secretary, 25
Dossee *v.* Bysack, 139
Dowlat *v.* Barkhat, 139
Doyly *v.* Sherratt, 108
Dresser *v.* Norwood, 16
Dublin Rail, 114
Duke of Leeds, 127
——— of Norfolk, 21
Dunn *v.* Flood, 95, 96
Dyer *v.* Dyer, 148

Fairley *v.* Freeman, 178
Farhall *v.* Farhall, 64
Farrar *v.* Barraclough, 74
Featherston *v.* West, 80
Fisk *v.* A. G. 24
Fletcher *v.* Ashburner, 147
Flockton *v.* Bunning, 128, 179
Floyer *v.* Banks, 21
Foley *v.* Burnell, 121
——— *v.* Wontner, 135
Ford *v.* Olden, 173
Forster *v.* Abraham, 54, 183
——— *v.* Ridley, 109
Fowkes *v.* Pascoe, 124
Fowler *v.* Odell, 59
Fox *v.* Hawks, 43
Francis *v.* Cockerell, 158
——— *v.* Francis, 62
Fraser *v.* Murdoch, 107
Freeman *v.* Whitbread, 69
Fry *v.* Tapson, 73, 93
Fulton *v.* Andrew, 191
Fyler *v.* Fyler, 75

Gandavathara *v.* Devanayaga, 54
Garth *v.* Cotton, 69
Gas Light *v.* Patterson, 177
G. C. Ghose *v.* Mackintosh, 100
Gibson *v.* Jeyes, 175
Gill *v.* Manning, 155
Gillett *v.* Peppercome, 175
Girdwood *v.* Clark, 190
Gladstone *v.* Bishop, 168
Glenorchy *v.* Bosville, 44
G. M. Tagore *v.* U. M. Tagore, 13, 22

Gooden *v.* Crowhurst, 19
Gosain *v.* Gosain, 14
Gosling *v.* Gosling, 112
Graham *v.* Wickham, 39
Gray *v.* Fowler, 96
—— *v.* Haigh, 127
—— *v.* Siggers, 66
Greene *v.* Greene, 40
Grier *v.* Grier, 45
Griffiths *v.* Porter, 90
—— *v.* Vere, 18
Grose *v.* Dassi, 70
Gubyar *v.* Fida, 198
Gungapersaud *v.* Gopeekrist, 154
Gwyn *v.* Neath Canal Co., 42
Yassein *v.* O. T., 106.

IGH *v.* Kaye, 23 155
ll *v.* Hallett, 175
v. Warren, 47
sraj *v.* R. Joita, 63
bin *v.* Darby, 109
ding *v.* Glyn, 43
dly *v.* Metropolitan Company, 81
man Railway, 115
h *v.* Hatch, 172
s *v.* Olby, 127
h *v.* Crealock, 42
d *v.* Pilley, 153
eford *v.* Bavenhill, 148
hley *v.* Hichley, 182
liard *v.* Eiffe, 64
v. Crook, 21
bat *v.* J. N. Kaladin, 32
h *v.* Leworthy, 107
e *v.* Osborne, 24.
—— Rennie, 157
gkinson *v.* Crowe, 45
v. Carnegie, 25
ster *v.* De La Tour, 157
n *v.* Brocklehurst, 71
v. Brocklehurst, 113
. Dartmouth, 66
v. Coupland, 158
Thompson, 24
run *v.* Baseley, 189
es *v.* Indian Gold, 77
. Pocock, 163
. S. Dossee, 70
. Hurst, 20
nson *v.* Payne, 160

Innes *v.* Mitchell, 27
In re Adams, 40
—— Agra Bank, 116
—— Ames, 178
—— Baker, 67
—— Bird, 65
—— Bond, 40
—— Boyce, 68
—— Boyes, 36
—— Brentwood, 196
—— Brier, 62
—— Brittlebank, 108
—— Brown, 73, 180
—— Carter, 42
—— Chancellor, 67
—— Chapple, 178
—— Cross, 112
—— Davison, 80
—— Dickson, 180
—— Donaldson, 90, 178
—— Fleethood, 36, 40
—— Godfrey, 73
—— Gordon, 54
—— Hall, 57
—— Hallet, 123
—— Hodgson, 114
—— Holmes, 7
—— Hoskin, 127
—— Household, 62, 73
—— Humphreys, 21
—— Imperials, 176, 182
—— Jackson, 62
—— Johnson, 64
—— Kahandas, 10
—— Klœbe, 26
—— Knapman, 114
—— Lofthouse, 93
—— Love, 90
—— Machu, 20
—— Morgan, 65, 190
—— Morvah Mining, 180
—— Natal Investment, 114
—— Noorington, 65
—— Ormsby, 109
—— Pope, 118
—— Rosher, 20
—— Rownson, 83
—— Sewell, 66
—— Speight, 61, 107
—— Strahan, 153
—— Southampton, 180

In re Tanqueray, 100
——— Tinkler, 81
——— Tweedie, 77
——— Warren, 102
——— Wedderburn, 58
——— Westbrook, 109
——— Williams, 24
——— Wood, 186
Irvine *v.* Sullivan, 40

Jackson *v.* Union Marine, 158
Jacobs *v.* Rylame, 80, 81
Jagger *v.* Jagger, 90
James *v.* Dean, 192
——— *v.* Holmes, 144
Janssen *v.* Chesterfield, 195
Jebb *v.* Tugwell, 66
Jervis *v.* Wolferstan, 71, 82
Jewsbury *v.* Mummery, 67
Johnson *v.* Ball, 34, 36
Johnson's Trusts, 45
Johnston *v.* Lloyd, 74
Jones *v.* Higgins, 106
——— *v.* Badley, 24
——— *v.* Macleod, 183

Kannan *v.* Nilakandan, 139
Kantao *v.* Muddun, 184
K. Byragee *v.* Ghose, 106
Keane *v.* Robarts, 70
Kearsley *v.* Woodcock, 20
Kershaw's Trusts, 62
Kingdon *v.* Castleman, 63
King *v.* Denison, 44
Kinloch *v.* Secretary of State, 5
Kirby *v.* Mash, 120
Kitton *v.* Hanslip, 168
Knight's Will, 90
Konwar *v.* R. C. Sen, 184
Kooer *v.* Singh, 71
Koonweree *v.* Hunooman, 184
Kopiloff *v.* Wilson, 158
Kronheim *v.* Johnson, 42
Kuar *v.* Kuar, 8

Lallubhai *v.* Mankuvarbai, 151
Lambe *v.* Eames, 40
Lamotte *v.* Cooke, 187
Lander *v.* Weston, 74
Langdale's, 75
Lee *v.* Sankey, 108
Legg *v.* Goldwire, 45
Leicester *v.* Burgess, 7
Le Neve *v.* Le Neve, 142
Lewers *v.* Shaftesbury, 161
Lewis Bowles's, 69
Lewis *v.* Nobbs, 68, 85
Life *v.* Siddal, 80, 179
Lingard *v.* Bromley, 86
Liquidators of Credit Ass. 177
Lloyds *v.* Jones, 58
Lloyd *v.* Pugh, 152
——— *v.* Wentworth, 182
Lomax *v.* Ripley, 35
London *v.* Lempriere, 116
Lyon *v.* Holme, 191
Lysaght *v.* Edwards, 185

Macleod *v.* Annesley, 74
Mallhoei *v.* Galityin, 26
McAlinden *v.* M'Alinden, 40
McCormick *v.* Grogan, 35, 40
McDonnell *v.* White, 72
Mant *v.* Leith, 74
Martinson *v.* Clowes, 174
Marsh *v.* Granville, 95
Marsden *v.* Kent, 65
Martinson *v.* Clowes, 174
Mayor *v.* East India Co., 50
——— *v.* Lowten, 52
Metcalfe's Will, 188
Metropolitan *v.* Heiron, 82
M. H. Khan *v.* S. Khan, 138
M. Hudson's, 37
Midland *v.* Taylor, 73
Miller *v.* Milier, 66
Mill *v.* Mill, 186
Milroy *v.* Lloyd, 42
Minet *v.* Morgan, 190
Minton *v.* Kirwood, 163
M. Lul *v.* B. Kumari, 102
Molyneux, 160
Montefiore *v.* Guedalla, 68
Montford *v.* Cadogan, 14
Moore *v.* Clench, 108
Morehead *v.* Magrath, 112
Morgan *v.* Lariviere, 28
Morris *v.* Canuan, 63
——— *v.* Debenham, 96
Mortimer *v.* Mortimer, 74
Mortimer *v.* Picton, 68
Moss *v.* Cooper, 37
Morvah Consols, 182

I. Sadik *v.* M. Ali, 2
. S. Chulla *v.* Kongseo, 115
uller *v.* Chattock, 153, 182
Mullick *v.* Mullick, 50
Munnoo *v.* Lalla, 178
Mutual *v.* Langley, 116

NATAL *v.* Good, 115
National Bank, 116
Newman *v.* Newman, 95
New Sombrero *v.* Erlanger, 179
New Zealand *v.* Ruston, 124
Nicholl *v.* Jowell, 163
Norris *v.* Frazer, 37
——— *v.* Robinson, 182
Nottidge *v.* Prince, 187
v. Fabian, 165

IEN *v.* Roche, 122
eston *v.* Fullalove, 20
nic Com. *v.* Sutherberry, 95
rke *v.* Bolinbroke, 195
rne *v.* Rowlett, 107
ton *v.* Johnson, 105

v. Way, 20
v. Ede, 27
v. Edmonton, 123
Paul, 197
n *v.* Brown, 23, 137
e *v.* Evens, 72
se *v.* Green, 71
erell *v.* Harris, 169
son *v.* Peterson, 70, 102
ppo *v.* Munnings, 15
s *v.* Lovegrove, 116, 135
rd *v.* Anderson, 67, 75
y *v.* Roberts, 19
v. A. G., 183
Mackreth, 174
re *v.* Gunning, 36
y *v.* Whetham, 183
v. Baddeley, 66, 67
v. Britton, 68
tt *v.* Hood, 102
v. Coke, 182
v. Savell, 86
. Pring, 36
ot *v.* Montefiore, 16
Hayward, 180
ndar *v.* Secretary, 45

RABY *v.* Ridehalgh, 130
Rackham *v.* Siddall, 15
Ram *v.* Prasad, 140
Ramsden *v.* Dyson, 165
Ranelaugh *v.* Hayes, 76
Rayner *v.* Preston, 180
Rebeiro *v.* Mackertich, 106
Redhead *v.* Midland, 158
Rennell *v.* Duffell, 123
Reynell *v.* Sprye, 86
Reyton, 74
Richardson, 152, 158
Richards *v.* Delbridge, 42
Richie *v.* Couper, 182
Robinson *v.* Lowater, 100
——— *v.* Pett, 89, 109
Robson *v.* Flight, 44, 142, 147
Roe *v.* Birch, 67
Rorke *v.* Webb, 173
Rothschild *v.* Brockman, 175
Rowbotham *v.* Dunnell, 37
Roxburgh *v.* Cox, 116
R. S. Singh *v.* Chapman, 93
R. *v.* Mayor of London, 7
Russell's Policy, 116
Russian Iron-Works, 162
Ryall *v.* Roll, 123

SAFFRON *v.* Rayner, 116
Salters Com. *v.* Jay, 7
Sanderson's Trust, 22
Sankey *v.* Lee, 105
Sargant *v.* Read, 118
Sarkies *v.* Dossey, 52
Sawyer *v.* Sawyer, 77
Schler *v.* Cottam, 178
Scotney *v.* Lomer, 63
Scott *v.* Freeman, 7
Sculthorpe *v.* Tipper, 65
Searle *v.* Laverack, 158
Selfe *v.* Broad, 178
Serle *v* Kerakoose, 179
Shama *v.* Jumoona, 70
Sharman *v.* Rudd, 83
Sharpe *v.* Ford, 179
Shee *v.* Hale, 20
Sichel *v.* Mosenthal, 160
Simpson *v.* Lester, 66
Singleton *v.* Tomlinson, 36
Slanding *v.* Bowring, 124, 152
Slaney *v.* Halney, 178

Smee *v.* Smee, 48
Smethurst *v.* Hastings, 179
Smith *v.* Attersoll, 36
South Sea Com. *v.* Wymondsell, 82
Spurn Lights, 74
S. Sainey *v.* P. Singh, 33
Stead *v.* Mellor, 40, 41
Stewart *v.* Sanderson, 62
Stone *v.* Stone, 57
Stot *v.* Milne, 90
Strickland *v.* Aldridge, 35
Sutcliffe *v.* Richardson, 151
Sutton *v.* Wilders, 73
Swansea *v.* Morgan, 197
S. West *v.* V. Holmesdale, 45
Symes *v.* Hughes, 155
Syud *v.* Dooli, 185

TABOR *v.* Brookes, 52
Talbot *v.* Scott, 121
Tarlton *v.* Hornby,
Taylor *v.* Blacklock, 8,
——— *v.* Cartwright, 79, 89, 179
——— *v.* Echersley, 118
——— *v.* Plumer, 122
Tee *v.* Ferris, 35
Tempest *v.* Camoys, 94
Tennant *v.* Trenchard, 181, 183
Teramath *v.* Lakshmi, 56, 94
Thakoor *v.* Government, 51
Thompson *v.* Dutton, 190, 191
Thomson *v.* Eastwood, 79, 80, 122
Thursby *v.* Thursby, 66
Todd *v.* Cooper, 134
—— *v.* Moorhouse, 153, 186
Tootal's, 67
Tourville *v.* Naish, 115
Townley *v.* Sherborne, 15, 85
T. R. Koer *v.* T. R. Koer, 41
Trumper *v.* Trumper, 186, 193
Turner *v.* Collins, 190
——— *v.* Turner, 79
Twopenny *v.* Peyton, 19
Twycross *v.* Dreyfus, 172
Tyler *v.* Yates, 196

URQUHART *v.* McPherson, 159

VICKERY *v.* Evans, 74
Viner *v.* Vaughan, 69
Vyse *v.* Foster, 75, 128

WADDELL *v.* Blochey, 182
Walker *v.* Symonds, 106
Wallgrave *v.* Tebbs, 37
Warburton *v.* Hill, 117
Warriner *v.* Rogers, 42
Watson *v.* Woodman, 82
Webb *v.* Ledson, 100
Weller *v.* Ker, 43, 108
West Bank, 116, 123, 132
Whitney *v.* Smith, 69, 82, 102, 17
Wilkinson *v.* Parry, 80
Willcocks *v.* Willcocks, 39
Williams *v.* Williams, 115, 169
Wilson *v* Hart, 124
——— *v.* West Hartlepool, 160
Winter *v.* Anson, 100
Woodhouse *v.* Woodhouse, 57, 8
Wood *v.* Downes, 122
Worcester *v.* Blick, 94, 197
Worthington *v.* Curtis, 152
Wrigley *v.* Sykes, 100

YASSEIM *v.* O. T., 140
Yates *v.* Fenn, 179
Yeatman *v.* Yeatman, 64
York *v.* Mackenzie, 176

ZAMBACO *v.* Cassavetti, 74, 81
Zemindar *v.* Secretary of State,

THE

INDIAN TRUSTS ACT,

NO. II OF 1882.

RECEIVED THE ASSENT OF HIS EXCELLENCY THE GOVERNOR-GENERAL ON THE 13TH JANUARY, 1882.

An Act to define and amend the law relating to Private Trusts and Trustees.

WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; It is hereby enacted as follows:—

Preamble.

Commentary.

...ian Councils Act, 1861 in effect re-enacting 3 & 4 Will. IV, ...gives the Governor-General in Council power to make ...egulations for all persons, places and things within ...territories in India and for all servants of the Government ...Dominions of Princes and States in alliance. Such laws ...ons are not to derogate from the prerogative of the Crown ...ity of Parliament or the allegiance of any person to the ...Every new law or regulation requires also the allowance of ...etary of State for India. The Act of 1861 enables the ...s of Madras and Bombay to make laws for the peace and ...ernment of their respective Presidencies but reserves ...ecified subjects for the Governor-General in Council.

CHAPTER I.

PRELIMINARY.

...itle. ...ence.

1. This Act may be called "The Indian Trusts Act, 1882": and it shall come into force on the first day of March, 1882.

Local extent.

It extends in the first instance to the territories respectively administered by the Governor of Madras in Council, the Lieutenant-Governors of the North-West Provinces and the Panjáb, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam; and the Local Government may, from time to time, by notification in the official Gazette, extend it to any other part of British India. But nothing herein contained affects the rules of Muhummadan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second chapter of this Act applies to trusts created before the said day.

Savings.

Commentary.

WAQF, is the term which designates in the Muhummadan law, a trust. Waqf for masâlik-i-âmma that is for public works of utili charitable purposes or regarded as public trusts. A waqf vate and make provision for the settler's family or relati may be partly private and partly public. Wakafa sig interpreted "I have bound up or detained." It implies the ment of the proprietary right in any article of property su tenements and the rest and the consecrating in such ma service of God, that it may be of benefit to men provided a the thing appropriated be at the time of the appropriatio perty of the appropriator.—*Mahammed Sadik* v. *Mahom* 1 Sel. Rep., new ed. 22. A dedication to any good purpose birrwal-ihsan of the Shiahs, or Wujûh-ul-khair of the H waqf. The terms 'birr,' and 'khair,' include all good a works and objects. To make a provision for oneself is held lawyers to be an act of khair. Hed. II, p. 891 and settleme one's family are approved and regarded as lawful by all the s Tagore Lectures, A.D. 1884. 179.

The Muhummadan appropriation of property for charitab designated by the word waqf, corresponds in many respe ritable trust of English law. The questions which h in India whether a man's poor relations can be objects ir counterpart in English law. Lord Chancellor W

and other English Judges have decided that a charity must be for classes of the public or the public at large not for private relations. In this respect we think the Muhummadan doctrine approaches nearer the principle of Christianity and natural religion alluded to in Matthew, xv. 5; Mark, vii. 11. Amongst the Hebrews Corban or waqf was "an offering to God of any sort bloody or bloodless, but particularly in fulfilment of a vow." The law laid down rules for vows: 1, affirmative; 2, negative. By the former persons animals and property might be devoted to God, but with certain limitations they were redeemable by money payments. By the latter persons interdicted themselves or were interdicted by their parents from the use of certain things lawful in themselves as wine either for a limited or unlimited period. (Leviticus, xxvii.; Numbers, xxx.; Judges, xiii. 7; Jeremiah, xxxv.; Acts, xviii. 18, &c.). Upon these rules the traditionists enlarged and laid down that a man might interdict himself by vow not only from using for himself, but from giving to another, or receiving from him some particular object whether of food or of any other kind whatsoever. The thing thus interdicted was considered as Corban, and the form of interdiction was virtually to this effect: "I forbid myself to touch or be concerned in any way with the thing forbidden as it was devoted by law," *id est*, "Let it be Corban." "A person might thus exempt himself from assisting, [illegible] assistance from some particular person or persons as [illegible] distress; and in short from any inconvenient obligation [illegible]ea of Corban though by a legal fiction he was allowed to [illegible] restriction in certain cases." It was with practices of [illegible]t the Divine Institutor of Christianity found fault as [illegible]he spirit of the Mosaic and Natural Laws.—*Smith's Dic-[illegible]he Bible.* Michaelis the most authoritative of the com- upon the Laws of Moses thus wrote respecting vows, s. 1: "Unless the Deity has expressly declared his ac- of human vows it can at best be but a very doubtful point hey are acceptable in his sight, and if they are not so, deduce from them the shadow of an obligation for it is not ere offer alone, but from an offer of one party and its e by another that the obligation to fulfil an engagement The divine acceptance of vows we can by no means take for considering that from our vows God can derive no benefit, in general they are as of little use to man."

Mutual Relations of an Undivided Family."—Respecting lations the presumption in favour of union, its difference arcenary, its property, the modes of enjoyment thereof in Benares and Bengal, a concise account may be found in n Hindu law and Usage, edition 1883, ss. 241—272.

According to the true constitution of an Undivided Hindoo Family, no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property that he has a certain definite share.

The proceeds of undivided property must be brought to the common chest or purse and there dealt with according to the modes of enjoyment by members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and each member has thenceforth a definite and certain share in the estate which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided. Where therefore a deed of partition was made and executed by the members of an undivided family dealing with and making actual partition of a portion of the joint estate, but leaving the remainder to be divided at a future period in the same manner, the Privy Council held, affirming the decision of the Sudder Dewanny Adawlut at Madras that, such deed being a division of right operated as a conversion of the tenancy, and a change of status in the family in respect of the property specified changing as it were the joint tenancy thereof into a tenancy in comm[illegible] operation of law making the members of the previousl[illegible] family a divided family in respect of such property. Ap[illegible] Seetaramier, appellant, and Rama Subba Aiyan and othe[illegible] ents, 11 Moore's Indian Privy Council Appeals, 75.

The English law relating to public or private, religiou[illegible] able endowments is to be found in Griffith's Institutes [illegible] pp. 66—74. For practice in India it must be supplemented [illegible] sal of Act XXI of 1860: "An Act for the Registration [illegible] ary, Scientific and Charitable Societies," "Act XVII of 18[illegible] Act to constitute an office of Official Trustee," and Act I[illegible] "An Act to confer certain powers on Religious Societies."

"TRUSTS TO DISTRIBUTE PRIZES TAKEN IN WAR AMONG THE CA[illegible] The Statutes and Acts relating to prize causes, prize Co[illegible] prize money are 39 & 40 Geo. III, c. 79; 2 & 3 Will. IV, c. 5[illegible] Will. IV, c. 41; 27 & 28 Vic., c. 25; 29 & 30 Vic., c. 4[illegible] 32 Vic., c. 38, and Act XIV of 1882, s. 616; 31 & [illegible] c. 38, provides for the payment of prize money due [illegible] persons than Her Majesty's European forces to the c[illegible] Indian Revenue and for the recovery thereof by the S[illegible] of State. A royal warrant granted booty of war to th[illegible] tary of State for India in Council "in trust" to distr[illegible]

amongst the persons held entitled to share it by the decree of the Judge of the Court of Admiralty to whom the matter had been referred by the Queen for that purpose with a direction that doubts should be finally determined by the Secretary of State unless the Queen should otherwise order. An action having been brought against the Secretary of State for India in Council by K on behalf of himself, and all the other parties entitled alleging that a portion only of the fund had been distributed and claiming an amount and distribution of the residue. The Court of Appeal reversing the decision of HALL, V.C., held, that the warrant did not operate as a transfer of property, or create trust: and that the defendant being merely the agent of the Sovereign to distribute the fund was not liable to account to any of the parties found entitled.—*Kinloch* v. *Secretary of State for India in Council*, L. R., 15 Ch. D. 1. See also *Banda and Kirwee Booty*, L. R., 4 A. & E. 436.

The words "prize of war" and their equivalents, "prizes taken in war," refer to captures made at sea. Captures made on land are called booty of war. The former are regulated by 27 & 28 Vic., c. 25. The latter is thoroughly discussed in the recent case of *The Banda and Kirwee Booty*, L. R., 1 A. & E. 109, 269.

Notwithstanding the scientific distinction between booty of war [illegible] of war it is possible or rather probable that the words [illegible]t may be intended to include both classes of acquisi- [illegible]stion however not having been settled, we set out the [illegible]n in the Banda and Kirwee Booty Case, L. R., 1 A. & [illegible]ading authority on the subject. In a cause of booty [illegible]*us probandi* lies upon the party claiming as joint captors [illegible]ne actual captors; and they are therefore entitled to [illegible] Court of Admiralty had no jurisdiction with respect to [illegible]rty captured on land by land forces exclusively—until [illegible] of 3 & 4 Vic., c. 65, the 22nd section of which enacting [illegible]ourt shall proceed as in cases of prize of war must be [illegible] not to mean that in all respects the distribution of booty [illegible]ssimilated to that of prize, but merely that the ordinary [illegible]roceeding in prize should be adopted. No person will be [illegible] share in booty on the sole ground of meritorious service [illegible]claim is supported on the principle of joint capture: nor [illegible]ourt relax the principles of joint capture on the ground [illegible]f the property captured was not strictly booty, or that the [illegible]f unusual magnitude. All prize belongs absolutely to the [illegible]ich for the last 150 years has been in the habit of granting [illegible]takers" who are of two classes—actual captors, and joint or [illegible]ve captors; joint captors are those who have assisted or are

taken to have assisted the actual captors by conveying encouragement to them or intimidation to the enemy. The union of the joint captor with the actual captor, under the command of the same officer, alone constitutes the bond of association which the law recognises as a title to joint sharing. Community of enterprise does not constitute association, and is equally insufficient as a ground for joint sharing of the bond of union though originally well constituted has ceased to be in force at the time of the capture. Such co-operation as will confer a title to a joint share of prize is also strictly limited to encouragement to the friend and intimidation to the enemy. The distinction between captures on land and captures at sea tend to show that in joint capture of booty, a wider application than is recognised in prize cases must be allowed to the term "co-operation:" concerted action on a wider scale than is feasible at sea being indispensable on land. The general rules for the distribution of booty to be adhered to as far as possible in accordance with naval decisions is the rule of actual capture. In the case of an army consisting of several divisions, the line of distribution in analogy to the rule of the service, and in conformity to military usage, will be drawn between division and division; that division to be regarded as the actual captor any portion of which has captured the prize. The association entitling to joint sharing must be military, and not political, and must be under the immediate command of the same commander. The co-operation which is necessary, and ... sharing is a co-operation directly tending to produce ... question. What tends to produce the capture, cannot ... defined, but strict limits must be observed of time, place ... Services rendered at a great distance from the places of ... done long before the capture was contemplated even ... affect the whole scene of operations, cannot be deemed su... tion as will give a title to share in booty. Indirect serv... insufficient. To entitle the Commander-in-Chief to shar... he must himself be in the field; but to be in the field it i... sary that he should be actually present with the division ... the capture, being in the field with one division, he is ... with all. But if troops have been placed under the *indepe*... mand of another, the Commander-in-Chief though actu... field does not share in booty taken by those troops. No ... should be made in the right of the general and person... share in booty; in principle the right of both stands or... that of the Commander-in-Chief: therefore all his staff who... field with him are entitled to share. Under the circum... the case, the costs of the rejected claimants were ordered ... out of the fund.

Where real property in a colony is vested in Her Majesty not by prerogative, but by an Act of the provincial legislature for the purposes of the province and subject to any future directions which may be given by the provincial legislature the sovereign for the purpose of any claims made to such lands under the provincial statutes is not regarded as within the jurisdiction of a Court of Equity in England notwithstanding the Petition of Right Act, 1860, *In re* Holmes, 2 J. & H. 527. Some trusts are regulated by special Acts of the legislature, such are the Husainabad Endowment (Act XV of 1878), the Jamsetjee Jeejeebhoy Baronetcy (Act XX of 1860). It is a general presumption of law that the legislature never intends to alter the existing law beyond what the scope of a particular Statute requires. It is a corollary to the said presumption that a special Act is not abrogated by a general one by mere implication. Having already given its attention to a matter and provided for it, the lawgiver is reasonably presumed not to intend to alter the special provision by an enactment adapted to classes of cases unless that intention is manifested in explicit terms, or by necessary construction. The section of the Judicature Act, 1875, that directed "except where it is otherwise provided by the new Act or rules annexed thereto, the judgment of the Court should be obtained by motion" was held not to affect an Act which authorised the superior Courts to send certain cases to be tried in inferior Courts and ordered the judgment to be signed in accordance with the result certified by the Registrar of the inferior Court.—*Scott* v. *Freeman*, 2 Q.B.D. 177. An Act which authorised "any person" to follow a particular trade was construed not to repeal the custom or local law of a borough which disqualified all persons who were not burgesses from following it.—*Leicester* v. *Burgess*, 5 B. & A. D. 246. But if there be in either Act, or in their nature something which renders it unlikely that any exception was intended in respect of the special law, the presumption is rebutted. Thus the Prescription Act, 2 & 3 Will. IV, c. 71, gave an indefeasible right to light after twenty years' enjoyment, notwithstanding any local custom. The Judges held that this abolished the custom of so important a city as London which had authorised the owner of an ancient house to build a new one on the old foundations to an height which would obscure the ancient lights of a neighbour.—*R.* v. *Mayor of London*, 13 Q.B. 1; *Salters Company* v. *Jay*, 3 Q.B. 109. Where a special Act incorporates the provisions of a general Act, any that are inconsistent with the special Act are by such inconsistency excluded.—*A. G.* v. *Great Eastern Railway Company*, L. R., 7 Ch. 475. We accordingly conclude that the Husainabad Endowment, and Jamsetjee Jeejeeboy special Acts are not abrogated by the General Trust Act of 1882.

Notwithstanding the confiscation of land in Oudh followed by its restoration under the Government Order 1858, affirming the titles of those with whom summary settlements had been made and the granting of sanads to the latter persons with full powers of alienation confirmed by the Oudh Estates Act, 1869, the legal owner may either by express agreement or by his conduct constitute himself a trustee for others as to the whole or part of the beneficial interest in the land, the subject of such restitution settlement and sanad.—*Kuar* v. *Kuar*, L. R. 3 Cal. s. (P. C.) 769.

The following concise summary (which however is not exhaustive) of the principal rules of the law of truster, trustee and trust may be useful to give precision to the mental notions thereof and to assist the memory: (1) Where jointly named, the nomination fails if any one refuses to accept. (2) If one is named as absolutely necessary, the nomination fails by his non-acceptance, death or removal. (3) The presumption however is for the surviving trustee to act. (4) If a certain quorum is named, that number must accept, and the nomination fails if the number becomes less unless otherwise provided. (5) A majority in the absence of a provision as to a quorum may act. (6) If the nominations be to an acceptor and survivor, it continues so long as there is an accepting trustee in life and acting. (7) A trustee is not bound to accept, but if he do so, he cannot resign at pleasure. (8) The office is gratuitous unless otherwise provided in the deed of nomination. (9) The trustees are personally liable for obligations undertaken as trustees. (10) Where they exceed their powers, they are also liable to the beneficiaries. (11) They may be personally liable on expenses to the opposite party in actions to which they become parties. (12) They are jointly liable to the beneficiaries unless it be otherwise declared in the nomination. (13) Where the trustees decline to accept, or where there is no power to assume additional trustees, and the trust falls before its purposes are executed, the Court will appoint new trustees or ajudicial factor, or the official trustee to act. (14) A trustee becoming bankrupt is sometimes removed. (15) A trustee will not be authorized by the Court to borrow money on security of the property in order to repair it. (16) On evidence of inability, a trustee may be discharged by the Court. (17) Trustees cannot make a charge or act as factor or agent, unless authorized so to do by the trust. (18) A trustee who does an act which enables a co-trustee to obtain sole possession of the estate which without that act he could not obtain, is liable to make good any loss overturned thereby. (19) Trustees are bound to exercise their judgment on the places of deposit, whether it be one chosen by the truster, or selected by themselves; and where there is unfortunately a loss, the question must always be how they are

liable under the circumstances of the case. (20) Commission for collecting rents is refused them, for no person must put himself in a position where his interest conflicts with his duty. (21) Mere declaration to divide property does not create a trust. A trust upon an absolute conveyance can only be proved by the oath of the trustee as between him and the truster. A formal deed is not necessary for the establishing a trust. And where the question is between third parties, the trust may be established by evidence at large. —(Adapted from Barclay's Digest of the Law of Scotland).

Repeal of enactments.

2. The Statute and Acts mentioned in the schedule hereto annexed shall, to the extent mentioned in the said schedule, be repealed in the territories to which this Act for the time being extends.

THE SCHEDULE.

STATUTE.

Year and Chapter.	Short Title.	Extent of Repeal.
29 Car. II, c. 3 ...	The Statute of Frauds	Sections 7, 8, 9, 10 and 11.

The Statute of Frauds applies to *Parsis*.—*Bai Maneckbai* v. *Bai Merbai*, I. R., 6 B. S. 363.

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

nd year.	Short Title.	Extent of Repeal.
f 1866 ...	The Trustees' & Mortgagees' Powers Act, 1866.	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36, and 37. In sections 39 and 43 the word "trustee" wherever it occurs, and in section 43 the words "management or" and "the trust-property or,"
..	The Specific Relief Act, 1877.	In section 12 the first illustration.

Commentary.

The Trustees Relief Acts were until very recently applied only in cases where the parties were European British subjects; the Acts themselves stating that they should only be extended to cases to which English law is applicable. In Bombay, however, WEST, J., placed a more beneficial interpretation on the words and administered its remedial process in a Hindu case. The parties sought to obtain the appointment of a new trustee under section 35. It was admitted that this could be done by the more expensive process of a regular suit and it was argued that the expression "cases to which the English law is applicable," applies to all cases wherein the principles of English law have to be referred to and that as the administration of trusts in India was governed by the rules of the English Courts of Chancery, the expression referred to the law to be followed not to the physical origin of the parties. The Trustees and Mortgagees Powers Act (XXVIII of 1866) which is by its terms made applicable to cases "to which English Law is applicable" has been most beneficially extended to Hindus in cases where the principles recognised by the English Equity Courts, (see Griffith's Institutes) are applicable. —*In re Kahandas Narrandas*, I. L. R., 5 Bom. 154.

The Statutes of Uses, 27 Hen. 8, c. 10 was repealed, with certain savings, from operating in the localities where the Transfer of Property Act, 1882, is or shall be in force.—Act IV, 1882, s. [redacted]

13 Eliz., c. 5; 27 Eliz., c. 4, which respect Fraud[redacted] ances are repealed, with certain savings, in the localiti[redacted] Transfer of Property Act, 1882, is or shall be in fo[redacted] 1882, s. 2, sch.

The repeal of any Statute Act or Regulation does n[redacted] thing done or any offence committed or any fine or pena[redacted] or any proceedings commenced before the repealing Ac[redacted] come into operation.—General Clauses Act, 1868, s. 6.

Interpretation clause.

3. A "trust" is an obligation annexed[redacted] ownership of property, and ari[redacted] of a confidence reposed in, [redacted] cepted by, the owner, or decla[redacted] accepted by him, for the be[redacted] another, or of another and the owner:

"trust":

the person who reposes or declares the con[redacted] is called the "author of the [redacted] the person who accepts the con[redacted]

"author of the trust":

"trustee": is called the "trustee": the person for whose benefit the confidence is accepted is called the "beneficiary": the subject-matter of the trust is called "trust-property" or "trust-money": the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the "instrument of trust":

"beneficiary":

"trust-property":

"instrument of trust":

"breach of trust": a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust":

"registered": and in this Act, unless there be something repugnant in the subject or context, "registered" means registered under the law for the registration of documents for the time being in force: a person is said to have "notice" of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to, or obtained by, his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229; and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

"notice."

de- IX

Commentary.

s of the Justinian Jurisprudence, relying too much upon the , tell us that in no case could "trusts" be created under the w *inter vivos*. But though a gift on a condition was not y called a *fidei-commissum* or trust, in substance in f legal remedy it amounted not only to a trust, but to a gnised by law.—Justinian's Code, 4, 6, 2; Dig. 12, 4, 11

Dig. 12, 4, 5, 1, 3; Dig. 17, 1, 30; Code 4, 6, 10; Gilbert in his law of Uses and Trusts derived the original of uses from a title under the Civil law, which, allows of an usufructuary possession distinct from the substance of the thing itself. BACON, L. C., however was of opinion that although usufructers come nearest in name to the use, it is nothing like in matter but that that which resembled the use most was *fidei-commissum*. The latter opinion was espoused by BLACKSTONE and Lord ST. LEONARDS.

Mr. Griffith in his Institutes of Equity, pp. 28—30, gives the following account of the origin of trusts in England:

"The feudal rules respecting the common law estate, the evasion of their severities by a confidence placed in the legal owner, called the feoffee to uses, the protection of such a confidence by Chancery and the many Acts of Parliament regulating or attempting to abolish such uses, the rise and progress of the trust estate, the most subtle piece of mechanism in a family settlement, illustrate the progress of English society, and exhibit the vitality of the equitable rights of families amid the efforts of the Executive to crush them. The purpose of this work, however, forbids us in questions connected with the history of property to dwell on what has been further than is necessary to explain the rules which at the present day are held in Courts of Equity.

"The famous subpœna of Waltham has already been noticed. 27 Hen. 8, c. 10, sought to reunite the equitable use to the legal ownership, and thus in effect to restore the feudal system, with its heavy burdens on man and land. In Tyrrel's Case (*a*) the Justices of the Common Pleas and SAUNDERS, C. J., fortunately decided, though we think that the decision was in accordance with the letter and not the spirit of the Statute, that a use cannot be limited on a use, and, therefore, that a second use, trust or confidence was not [illegible]. Thus, by the addition of two or three words to a conveyance equitable use might be preserved, though now it had [illegible] name and become a trust.

"The protection afforded by Chancery to uses and trusts [illegible] merly very meagre. It was looked upon as a chose in action the *cestui que* use or trust alone, and not any one claiming them, could enforce; and this only against the person confidence was actually reposed, not against one claiming after him.

"At the present day the trust is an equitable interest or real or personal property, though distinct from the legal ownership entitling to the use and profits, and which is enforced in [illegible]

(*a*) Cur. Ward. Dyer (4 & 5 Phil., & M. 20), 155a.

equity against any person possessing the legal ownership, except a purchaser for valuable consideration without notice. Though not liable to escheat or other feudal burdens, how far it is liable to be forfeited for treason under 33 Hen. 8, c. 20, is open to discussion. It is liable to be taken in execution under a writ of extent, at the instance of the Crown. Since 1 & 2 Vic., c. 110, it is liable to be taken in execution for debts, though great protection is still afforded to the estates of married women. It is an asset after death, but whether a legal or an equitable one is in controversy. If it comes to the person who holds the legal estate it will merge therein. It is, in most instances, capable of assignment. This proposition we have to discuss more at large hereafter. Lastly, it may, with some restrictions, be limited at the will of the person creating it.—*Cujus est dare ejus est disponere.*"

In the Trusts (Scotland) Acts 1861 to 1884 this word 'trust' means and includes any trust constituted by any deed or other writing or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body and the appointment of any tutor, curator or judicial factor by deed decree or otherwise.— 47 & 48 Vic., c. 63, s. 2.

re Law Lectures which were delivered A.D. 1881, the eding that in which the Indian Trusts Act received he Governor-General a trust was thus defined "an osed upon some person or persons having the ownerrty whether moveable or immoveable to deal with for the benefit of some other person or persons, or purposes."

thing in Hindu law which forbids trusts or is in any nt to them or inconsistent with their existence. The system does not profess to be exhaustive on the contrary tem in which new customs and new propositions, not o the old law, may be engrafted from time to time accordmstances and the progress of society. Fiduciary relations the transactions and intercourse between men extend. ability trusts had by degrees sprung into existence before ny record of them in our reports. See the remarks of *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore*, 4 B. L. 34. On appeal to the Privy Council their Lordships said, malous law which has grown up in England of a legal estate paramount in one set of Courts and an equitable estate which unt in Courts of Equity does not exist in and ought not to ced into Hindu law. But it is obvious that property whether or immoveable must, for many purposes, be vested more

or less absolutely in some person or persons for the benefit of other persons and trusts of various kinds have been acted on in India in many cases."—S. C. 9 B. L. R. 401. Their Lordships instanced. *Gosain* v. *Gosain*, 6 Moore, I. A., s. 53. In that case a purchase of real estate was made by a Hindu in the name of one of his sons. The Judicial Committee held that the presumption of Hindu law was in favour of its being a benamee purchase, and that the burden of proof was on the party in whose name it was purchased to prove that it was not and that he was solely entitled to the legal and beneficial interest. Though the conveyance was in the English form of lease and release they declared the son to be a trustee for the father.

In the Tagore Case the following weighty observations also were made by PHEAR, J.:—"I confess the broad assertion that trusts are unknown to Hindu law, took me somewhat by surprise. There is probably no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India and possession of dominion over property coupled with the obligation to use it either wholly or partially for the benefit of others than the possessor is, I imagine, familiar to every Hindu. I need only point to the cases of the mother acting as guardian of her infant child, the *Karta* of a joint family managing on behalf of all members and the gomasta bringing, selling, and breeding in the name for the benefit of an unseen principal."—4 B. L.

"Acceptance."—Under the Statutes of frauds, goo[ds] ceived actually without the receiver making himse[lf] under the contract as accepting them within the St[atute]; the case of a trust acceptance implies an assent to th[e] other party that the office should be accepted. A pers[on] trustee took the trust-deed into his possession for s[ome] until some one else would undertake the duties. The [court] that he had not accepted the office.—*Evans* v. *John*, 4 Execution of a trust-deed is good evidence of acceptanc[e] of a will there is a slight presumption that a devise[e] accepts the devise.—*Montford* v. *Cadogan*, 19 Ves. 638 interference with the trust-property are evidence of a[n] Advertising the property for sale or giving notice to the t[enants] pay him the rents, or requesting the proper officer to en[ter] would be conclusive evidence.—*Bence* v. *Gilpur*, L. R. 3 E[x.] person appointed as executor and trustee cannot accept th[e] office and refuse the latter. An executor after making a[n] ment of the property on the appointment of a new trus[tee] the property out of the testator's estate and subjects it [to] the trust which such conduct may conclude him to have

—*Phillippo* v. *Munnings*, 2 M. & C. 309. The English law constitutes an executor who takes probate of the will of an executor, the executor of the first testator.—*Brook* v. *Haymes*, L. R., 6 Eq. 25. The Succession Act X of 1865, section 229 and the Probate and Administration Act of 1881, section 19, allow the chain of executorships to be broken. Persons may render themselves liable as trustees without having any right to the office. Possession of a trust fund with notice of a trust may create this liability.—*Rackham* v. *Siddall*, 16 Sim. 297 ; 1 Mac. & S. 607.

In these commentaries the technical phrase *cestui que trust* is occasionally employed instead of beneficiary ; for in some cases a person may be a beneficiary who is not a *cestui que trust*.

"The law for the registration of documents," namely, Act III of 1877.

"Negligence," is a want of proper care and is exhibited in doing what ought not to be done or leaving undone what ought to be done. In some cases a party aggrieved thereby may bring an action for damages in others punishment is inflicted under the criminal law. For negligence in law a stranger who is injured may have an action as where the damage results from a neighbour's house being out of repair. Persons in a special relation arising out of contract or otherwise have a similar remedy. With reference to these special relations, negligence is divided into slight ordinary and gross. Thus in bailments for the sole benefit of the bailee he is liable for the first description, in bailments for the benefit of bailor and bailee he is liable for the second, and in bailments for the sole benefit of the bailor, the bailee is liable only for gross negligence. Ordinary negligence is the absence of that care which might reasonably be expected. But gross negligence is usually spoken of when a person has used less care than he would have used when acting in his own affairs and what would be gross negligence in a prudent man may not be so in a reckless one. It is most frequently applied to solicitors, doctors and others who have been trained to show special skill and the failure to exhibit such special skill will, in such instances, be reckoned gross negligence though their services be gratuitous. Where a beneficiary's negligence contributes to the loss occasioned by the trustee's negligence it is called contributory and disentitles the loser to relief, ELDON, L. C.—*Townley* v. *Sherborne*, 2 White & Tudor's Leading Cases, 960, 6th ed.

By "wilful" is meant what is deliberate or intentional. A "wilful default" is an act of omission done with intention. Mortgagees are liable for losses arising from their wilful default. Hence the omission to let the land beneficially when opportunity offers, renders a

mortgagee in possession liable to give credit in taking the accounts for what has been lost through his wilful default."

"The Indian Contract Act, 1872, section 229," is worded as follows: —"Any notice given to, or information obtained by, the agent provided it be given or obtained in the course of the business transacted by him for the principal shall as between the principal and third parties have the same legal consequence as if it had been given to or obtained by the principal." Illustrations. (*a*). A is employed by B to buy from C certain goods of which C is the apparent owner and buys them accordingly. In the course of the treaty for the sale, A learns that the goods belong to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods. (*b*). A is employed by B to buy from C goods of which C is apparent owner. A was, before he was so employed, a servant of C and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent B may set off against the price of the goods a debt owing to him from C." Illustration (*b*) restricts the rule laid down in *Dresser* v. *Norwood*, 17, C. B. N. S. 466 and *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511. The doctrines relating to fraud moral and legal and notice, express, and constructive are treated of in *Cornfoot* v. *Fowke*, 6 M. & W. 358—Griffith's Institutes of Equity, pp. 175—202, 60, 62.

The General Clauses Act, 1868, makes words importing the masculine gender to include females; the singular number to include the plural and *vice versâ;* the word person to include any company or association or body of individuals whether incorporated or not. It also contains several other provisions for shortening the language used in Acts of the Governor-General of India in Council, passed after it came into operation.

"Expressions used herein and defined in the Indian Contract Act, 1872." The definitions of the Indian Contract Act, 1872, not only follow the course of a contract and supply an analysis of its component parts; they include such titles as coercion, fraud, misrepresentation and other doctrines usually treated of in books upon equity.

CHAPTER II.

OF THE CREATION OF TRUSTS.

Lawful purpose.

4. A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (*a*) forbidden by law,

or (*b*) is of such a nature that, if permitted, it would defeat the provisions of any law, or (*c*) is fraudulent, or (*d*) involves or implies injury to the person or property of another, or (*e*) the Court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Explanation.—In this section, the expression "law" includes, where the trust-property is immoveable and situate in a foreign country, the law of such country.

Illustrations.

(*a*) A conveys property to B in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void.

(*b*) A bequeaths property to B in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support A's children. The trust is void.

(*c*) A, while in insolvent circumstances, transfers property to B in trust for A during his life, and after his death for B. A is declared an insolvent. The trust for A is invalid as against his creditors.

Commentary.

Instances of unlawful objects or considerations which avoid an agreement may be found in illustrations (*e*) to (*k*) inclusive appended to section 23 of the Indian Contract Act IX of 1872. They include a promise to obtain for another employment in the public service, a promise by a land agent to obtain from his principal a lease; a promise to drop a prosecution; a purchase of a defaulter's estate when sold for arrears of revenue; a promise by a muktar to use his influence, and an agreement to let a daughter for concubinage.

(*a*) The English law reports and text-books contain many pages devoted to the rule against perpetuities, that is the rule which forbids the limiting and settling of property in such a method as to prevent it becoming again an article of commerce. The leading case upon the subject is *Cadell* v. *Palmer*, H. L., 1 Cl. & F. 372. As however

the doctrines are summarised in the Indian Transfer of Property Act, sections 14—17, it will be sufficient for our present purpose to quote those sections and to remark that what by the Transfer of Property Act is forbidden to be done directly, is also forbidden to be done indirectly by a trust.

"No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age, the interest created is to belong." Section 14.

"If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class." Section 15.

"Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails." Section 16.

"The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind." Section 17.

A similar observation applies to trusts for accumulation. The leading case on this branch of the law is *Griffiths* v. *Vere*, 9 Vesey, 127, and the present rule forbidding a transfer for the purpose is laid down in the Transfer of Property Act, 1882, section 18.: "Where the terms of a transfer of property directs that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed."

"*Exception.*—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date, and at the end of the year, such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed."

The Indian Succession Act X of 1865 contains rules against similar dispositions of property by will, the meaning of which is exemplified by numerous illustrations. See sections 101—104. As

regards transfers and bequests of estates in Oudh, Act I of 1869, section 12, may be consulted.

Declarations of trusts without the preliminaries required by section 5 of the present Act are also forbidden wherever the present Act operates. See section 5.

According to Hindu law a perpetuity save in the case of religious and charitable endowments is illegal. Thus trusts to accumulate property for ninety-nine years, to accumulate until the fund should reach three lakhs and to postpone enjoyment until the testator's children should reach the age of twenty-one, have been held to be void. The rule cannot be avoided by means of a colourable dedication to an idol. The law of wills amongst Hindus is analogous to the law of gifts. A person taking under a will must be of a capacity to take a gift by disposition *inter vivos* and must, therefore, be either in fact or in contemplation of law in existence at the death of the testator. Accordingly a gift to an unborn child, by will, except in the case of an infant in the womb, or an adopted son, is void. And what cannot be done by gift, cannot be done by a trust. So a trust for the maintenance of a family for ever is void. But a father may delay the rights of his issue by interposing a valid estate.—W. F. Agnew, p. 40. (*b*). A trust cannot be created with a proviso against aliening the interest of the beneficiary, or against making it subject to the claims of creditors. But a donor by the use of apt words may give property for the maintenance of a man, his wife and children, and at the same time conserve it against the claims of creditors and the rules of the bankruptcy law. The Vice-Chancellor of England decided that nothing passed to the assignees in bankruptcy where a fund had been given to trustees upon trust to apply the whole or such part of the interest as they should think fit during the life of A for his support and maintenance and no other purpose. Trustees were to apply the annual produce "for the support and maintenance of the son, any wife and child or children he might have as the trustees should, in their discretion, think fit." The same Judge held that "it did not follow from the gift that anything was of necessity to be paid, but that the property was to be applied and there might be a maintenance of the son and of the wife and children without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the son and the wife and children with all that was necessary for maintenance, and if so, the bankruptcy officials would not be entitled to anything."—*Piercy* v. *Roberts*, 1 M. & K. 4; *Twopeny* v. *Peyton*, 10 Sim. 487; *Gooden* v. *Crowhurst*,

10 Sim. 642; In *Rippon* v. *Norton*, 2 Beav. 63, in which case the trust was no less strongly worded there being three beneficiaries besides the bankrupt, the property was divided into quarters, and his quarter handed over for the benefit of his creditors. The doctrine of the last mentioned case was followed in *Page* v. *Way*, 3 Beav. 20; *Kearsley* v. *Woodcock*, 3 Hare, 185. Yet, though an absolute settlement of property restricting alienation and excluding the rights of creditors would be ineffectual to accomplish the two last objects, those objects might be attained by settling the property upon A until alienation, bankruptcy, or insolvency with a limitation over to B upon the happening of either of these events. So they might by settling the property on A for life or absolutely in the first instance with a proviso that on alienation, bankruptcy or insolvency it should shift over to B.—*Shee* v. *Hale*, 13 Vesey, 404. Nevertheless a person cannot effectually so settle his own property.

The Courts in England until recently ruled that real or personal estate might be given to a person absolutely with a partial restraint on the power of alienation, such as to a person named or within a particular period. The restriction for a particular period nevertheless was held invalid by Mr. Justice PEARSON, *in re Rosher*, 26 Ch. D. 801. And where there was a gift of real estate to A, her heirs and assigns subject to a proviso determining her estate in the event of her bankruptcy and then limiting the estate over to other persons, the gift to A was held to be absolute, and the proviso void for repugnancy.—*In re Machu*, 21 Ch. D. 838. In another case reported in the same volume, a trust for A for life with a proviso that on "his charging or incumbering the property, the gift to him should be absolutely forfeited, and the subsequent gifts accelerated," was held good though there was no person capable of taking the accelerated gifts.—*Hurst* v. *Hurst*, 21 Ch. D. 278. The general principle applicable both to conditional limitations and discretionary trusts was thus summarily stated in the House of Lords, by Lord O'HAGAN, "If the debtor have a vested property and an absolute claim, they will, of course, pass from him; but if the property and claim are subject to conditions and liable to be affected by the discretionary action of other people, the creditor cannot escape the fulfilment of the conditions, or deny the effect of that exercise of the discretion which would have bound the debtor."—*Chambers* v. *Smith*, 3 App. Cas. 795 *(d)*. A provision by deed in favour of the future issue of an avowedly illicit intercourse is obnoxious to the plain rule that if the gift takes effect at all it takes effect as a gift on condition that there shall be unlawful intercourse resulting in the birth of offspring and is therefore void.—SELBORNE, L. C.; JAMES and MELLISH, L.J.J.; *Occleston* v. *Fullalove*, L. R., 9 Ch. App. 147. The two last mentioned

Judges also held that a gift to a testator's illegitimate child by will, but not born at the date of the will was good in opposition to the opinion of the first mentioned Judge. They all agreed that a provision by will for the future offspring of an illicit intercourse, that is future in respect of the will, taking effect by reason of the illegal condition and the immoral inducement held out to continue in a life of immorality is void. The judgment of the Lord Chancellor is the most logical. But the judgments of the Lords Justices are sustainable on another ground. A long string of cases shows the regard of the English law to the marriage tie by refusing to recognize illegitimate offspring as children, at the same time it allowed them to take when mentioned by name, or when otherwise clearly recognised as objects of the donor's bounty.—*Hill* v. *Crook*, L. R., 6 E. & I. 265; *In re Humphries*, 24 Ch. D. 691.

It is also part of the policy of the law to uphold the recognised rules of succession and inheritance, trusts in contravention thereof are therefore void.—*Duke of Norfolk's case*, 1 Vernon, 164.

A person cannot settle property upon trust for illegitimate children to be thereafter born since this leads to immorality, but the trust is void, and the beneficial interest results to the settlor. But illegitimate children born at the date of a settlement or otherwise identified as the individuals intended to take may take. The word 'child' or 'children' alone is not sufficient.—In *Occleston* v. *Fullalove*, L. R., 9 Ch. App. 147, the Court of Appeal is thought by some to have modified the rule. A testator who had gone through the ceremony of marriage with M L his deceased wife's sister who had two daughters C and E by him, and who was *enceinte* with a third at the date of the will, gave a moiety of his property to trustees in trust for M and for life, and after her death, for his reputed children C and E, and all other children which he might have or be reputed to have by M, L then born or thereafter to be born. The third child was born before the testator's death and was acknowledged by him as his child. The Court of Appeal in opposition to the opinion of SELBORNE, L. C., held that the after born child was entitled to share with her sisters under the will.—*Floyer* v. *Bankes*, 8 L. R. Eq. 115; *Sykes* v. *Sykes*, 13 L. R. Eq. 56, maintain the rules laid down by GUILDFORD, L. K. in the *Duke of Norfolk's case*, 1 Vernon, 164.

In some cases trusts for maintenance of an insolvent and his family have been upheld even in respect of the insolvent's maintenance; in others the Court have decided in favour of the creditors. The best practical test to distinguish the cases is the question whether on the decease of the *cestui que trust* his executor would have a right to call upon the trustees retrospectively to account for the

arrear. If he would, the creditors are then entitled prospectively to the payment in future.—*Sandersons Trust*, 3 K. & J. 497.

The Transfer of Property Act, 1882, sections 2 and 6, creates the following restrictions upon the transfer of property except in cases under Hindu, Muhammadan, or Buddhist law and section 4 of the Trusts Act (*b*) prevents the evasion of such restrictions by means of trusts.

(*a*) The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.

(*b*) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of property affected thereby.

(*c*) An easement cannot be transferred apart from the dominant heritage.

(*d*) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(*e*) A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred.

(*f*) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(*g*) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.

(*h*) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee. Section 6.

The same Act, section 12, makes void a condition or limitation which determines an interest on insolvency.

What cannot be done by gift is not rendered legal by the intervention of a trust in Hindu Law.—*Tagore* v. *Tagore*, 9 B. L. R. 402. Perpetuities except for charitable and religious endowments are illegal. A like doctrine obtains in English law.

A widower before going through the ceremony of marriage with his deceased wife's sister at a period when such marriages were unlawful and known by the parties in question to be so executed a trust deed. Therein it was recited that he was desirous of making a settlement on the lady, and that he had transferred certain shares to trustees and thereby it was declared that the trusts should be for the separate and inalienable use of the lady during her life and

after her death as she should, by deed, or will, appoint. They lived together as man and wife until his death when his personal representatives instituted a suit to set aside the settlement on the ground that it was founded on an immoral consideration. Lord SELBORNE said, "Relief is sought by the representative not merely of a *particeps criminis* but of a voluntary and sole donor on the naked ground of the illegality of his own intention and purpose and that not against a bond or covenant or other obligation resting *in fieri*, but against a completed transfer of specific chattels by which the legal estate in those chattels was absolutely transferred and vested in trustees for the sole benefit of the defendant. I know of no doctrine of public policy which requires or authorizes a Court of Equity to give assistance to such a plaintiff under such circumstances. When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effect an unlawful purpose, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of his own property by one *particeps criminis* to another is in itself neither fraudulent nor prohibited by law, and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall while the object is yet unaccomplished a gift intended as a bribe to iniquity. If public policy is opposed as it is to vice and immorality it is no less true as was said by TAURO, L. C., in *Benyon* v. *Nettlefold*, 3 M. & G. 102, that the law in sanctioning the defence of *particeps criminis* does so on the grounds of public policy —namely, that those who violate the law must not apply to the law for protection."—*Ayerst* v. *Jenkins*, 16 L. R. Eq. 283. When it is desired to create a similar settlement, the word 'marriage' should be avoided. Inasmuch as no such legal marriage can take place.—*Pawson* v. *Brown*, L. R., 13 C. D. 202.

A plaintiff having been apprehensive of an indictment for bigamy had to escape forfeiture conveyed his land to the defendant on a parol agreement to reconvey it when it should be safe so to do. It transpired that there was no danger of an indictment. As the trust was not evidenced by writing, and as there was no illegality in fact but only in intention, the Court ordered the property to be retransferred.—*Davies* v. *Otty*, 55 Beav. 208.

Where a trust is created for an unlawful and fraudulent purpose, the Court will neither enforce the trust in favour of the parties to be benefited, nor assist the settlor to recover his estate.—*Haigh* v. *Kaye*, L. R., 7 Ch. A. 473; *Barton* v. *Muir*, L. R., 6 P. C. 134. Where the illegal intention fails and no trust arises thereon, the equitable interest results and may be recovered by the settlor.—*Dawson* v. *Small*, L. R., 18 Eq. 114. And even where the trust arises a person not

party to the settlor's fraud, but claiming through him has been allowed to recover.—*Childers* v. *Childers*, 1 DeG. & J., 482.

A capricious trust which will benefit no *cestui que trust* is void. For example, a testatrix devises a house to trustees in fee upon trust to block up all the rooms except four in which a caretaker and his wife were to live, and after twenty years in trust for A in fee. The prior trust was held void.—*Brown* v. *Burdett*, 21 L. R., Ch. D. 667. A trust to keep up a family tomb is void, but one to keep a church in repair may be good as a charitable trust.—*Hoare* v. *Osborne*, L. R., 1 Eq. 585. Though the amount to be applied for the unlawful purpose be not expressly stated. The Court will, if it be practicable, ascertain the amount which would be sufficient for the unlawful purpose and hold the residue good.—*Fisk* v. *Attorney-General*, L. R., 4 Eq. 521; *In re Williams*, L. R., 5 Ch. D. 735.

In England where in past years the laws upholding forms of religious belief have been unduly strict proposed devisees have frequently entered into an engagement with a testator in his lifetime—a secret trust of an unlawful nature; or after the devise has taken effect for the first time learnt from some letter left in a drawer or otherwise the wishes of the testator. In the former case there arises a trust resulting for the benefit of the testator's heir at law, in the latter the devise will be good.—*Jones* v. *Badley*, L. R., 3 Ch. Ap. 362.

A trust in general restraint of marriage is void.

But one restraining the second marriage whether of a man or woman has been held good.—*Allen* v. *Jackson*, L. R. 1 Ch. D. 399.

Chief Justice RUGGLES said, (*Hoyt* v. *Thompson*, 1 Selden, U. S. Rep.) 340, "It is a conceded principle that the laws of a state have no force inherent and essential beyond the territorial limits. But the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice, when neither that state nor its citizens will suffer any inconvenience from the application of the foreign law. This courtesy or comity is established not only from motives of respect for the laws and institutions of foreign countries, but from considerations of mutual utility and advantage." A Court of Equity may also restrain a person within its jurisdiction from taking proceedings in Courts out of its jurisdiction as in foreign countries properly so called, confederate states, colonies and dependencies. The interference however is grounded not upon any pretence to control or overrule the decision of such Courts to examine judicial and administrative acts abroad, but on the circumstance of the party on whom the order is made being within the power of the Court.

Should the foreigner have property within the territorial jurisdiction of the Court, a useful and effectual injunction may be issued against him. Should he however himself seek no assistance from the Court, very strong reasons must be adduced to obtain an injunction restraining him from enforcing an obligation according to the law of his own country.—CRANWORTH, L. C., *Carron Iron Company* v. *Maclaren*, 5 H. L. C. 416.

A British subject entitled to real and personal estate both in England and in the Netherlands died domiciled in England, leaving a will by which he gave to trustee upon certain trusts all his property there and abroad, but as to his foreign property so far only as he could dispose of it according to the law of the country where it was situate. A decree was made in England for the administration of his estate. Subsequently one of his children instituted proceedings in the Netherlands for the administration of both his real and personal estate in that country. The Courts made an order restraining the prosecution of the pending proceedings in the Netherlands and the taking any other proceedings there as to the personal estate. Judicial doubts were expressed whether the proceedings as to the real estate ought not to be restrained.—*Hope* v. *Carnegie*, L. R., 1 Ch. App. 320. CRANWORTH, L. C., summed up the authorities and gave the following as the result: "If the circumstances are such as would make it the duty of the Court to restrain a party from instituting proceedings in England, they also warrant it in restraining proceedings in a foreign Court. But it is not the duty of the Court so to act, if from any cause it appears likely to be more conducive to substantial justice that the foreign proceedings should take their own course."—*Carron Iron Company* v. *Maclaren*, supra.

Strange as it may appear, England, Scotland and Ireland though forming the United Kingdom, are by their respective Courts treated as foreign countries. A testator domiciled in England gave his real and personal estate in England and Scotland to be divided between two of his sons, and appointed his three sons executors. The will was proved in England by two of the sons. At the death of the testator, the other son, one of the residuary legatees, was indebted to an Insurance Company carrying on business in Scotland and England who obtained judgment in an action in Scotland against such son and proceeded in Scotland against the executors to arrest the amount in their hands to which the indebted son was entitled. The Court upon the executors undertaking to obtain forthwith an administration decree in England, granted an injunction to restrain the proceedings in Scotland against the executors. The principles upon which the Indian Courts treat final foreign judgments are succinctly stated in *Doss* v. *Secretary of State for India in Council*,

L. R. 19 Equity, 509, the plaintiffs represented certain creditors of the King of Oudh and sued in respect of a debt contracted in 1794 and claimed to be entitled to a charge upon the revenue of the territory of Oudh. The English Court of Equity held that, that as the debt was one which there were no means of enforcing against the King before the annexation in 1856, neither could it have been enforced after the annexation against the East India Company: Also, that the annexation having been a solemn Act of State by the Company as trustees for the British Government, that Act could not be reviewed by any Municipal Court: Also, that the plaintiffs being natives of India, the subject-matter being in India, the defendant being capable of being sued in India, an English Court of Equity was not the proper tribunal to try the question between the parties, it being impracticable to give effect to any decision in England.

Code of Civil Procedure, XIV, 1882, section 14, enacts that "no foreign judgment shall operate as a bar to a suit in British India—

(*a*) if it has not been given on the merits of the case:

(*b*) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India:

(*c*) if it is in the opinion of the Court before which it is produced contrary to natural justice:

(*d*) if it has been obtained by fraud:

(*e*) if it sustains a claim founded on a breach of any law in force in British India."

A bill was filed by a foreigner against another foreigner, and an English Company formed for working a Russian mine to restrain the Company from paying to a foreigner part of the profits of the mine which were claimed by the plaintiff as commission, and also for an account of profits against the Company. MALINS, V.C., held that a foreigner resident abroad, cannot bring another foreigner into Court in England respecting property abroad and the Company being made party as shareholders only. In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors, *Klœbe, in re*, L. R. 28 Ch. D. 175, the action against the principals failing failed as against it.—*Matthœi* v. *Galityin*, L. R. 18 Eq. 340.

A shipowner of Hamburg made in that city an agreement with an Englishman for sale to him of a ship whenever she might return from the voyage on which she then was. The seller was to pay all charges up to the date of delivery, and to make corresponding allowances in case she arrived at the port of discharge in a damaged

state over and above ordinary wear and tear or under average. The ship returned and was ordered by the owner to proceed to Sunderland. The master of the ship, the authorized agent of the owner in the sale, refused to deliver her except on certain terms. The Lords Justices allowed substituted service of the process of the Court upon the master and restrained him from removing the ship out of the jurisdiction.—*Hart* v. *Herwig*, L. R. 8 Ch. Ap. 860.

It is a rule of International law that debts and contracts so far as they affect personal property have no *situs*, but follow the domicile of the owner. To a great extent trusts of personalty under wills come within the same rule. Courts of Equity however go beyond this rule and where there are trusts affecting lands situate in a foreign country, and the trustee comes within the jurisdiction of the Court, such trusts may be enforced by process *in personam*.—*Earl of Kildare* v. *Eustace*, 1 Vern. 439. HARDWICKE, L. C., said, it may be vain to make a decree which cannot be enforced against property, but that is no objection in special cases for the decree of Equity acts primarily on the conscience. An action of rent having been brought for arrears of a rent charge upon lands in Australia it was held affirming the decision of the Court below that the *venue* was local and the action could not be maintained in England.—L. R. 10 C. P. 583; 1 C. P. D. 51.

A foreclosure decree being a decree *in personam* inasmuch as it deprives the mortgagor of his personal right to redeem a Court of Equity in England, has jurisdiction to make such a decree in respect of a mortgage between an English mortgagor and mortgagee of lands in the Island of Nevis in the West Indies.—*Paget* v. *Ede*, 18 L. R. Eq. 118; *Innes* v. *Mitchell*, 1 Ph. 710.

A foreign judgment obtained by the fraud of a party to the suit in the foreign Court cannot afterwards be enforced by him in an action brought in an English Court, even although the question whether the fraud has been perpetrated was investigated in the foreign Court and it was there decided that the fraud had not been committed. To an action claiming the value of certain goods and brought upon a foreign judgment whereby the defendants were ordered to return to the plaintiff the goods or to pay her their value, the defence alleged that the plaintiff obtained the foreign judgment by fraudulently representing to the foreign Court that the goods were not in her possession and by fraudulently concealing from the foreign Court that the goods were then in her possession and concealed by her. The defence was held to be good.—*Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. 295. See also Act XIV of 1882, section 14.

When a trust fund has been paid into Court, that Court may pro-

ceed to administer it even although a foreign sovereign may be interested therein and may not think fit to come before the Court in a suit relating to it. A writing opening a credit for a particular sum cannot of itself constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is a mere statement that the person writing it will act as paymaster to the person to whom it is written up to a certain amount on his performing the conditions set forth in it. L entered into a contract (bearing date 30th November 1870), with the French Minister of War represented by his delegate in London, J. to supply certain articles of a certain quality, the whole to be supplied by the 10th of January 1871. Time was to be considered of the essence of the contract. L desired some arrangements to be made as to payment. M. & Co. who acted in London as Financial Agents for the French Government, wrote to L a letter bearing date the 1st December 1870 in these terms: "We are instructed by J to advise you that a special credit for the sum of £40,000 has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered upon receipt of reception issued by the French Ambassador or by J." The goods were not delivered according to the contract. The House of Lords held that the letter did not constitute an equitable assignment as of a fund in their hands and that consequently this was not a matter for the exercise of the jurisdiction of the Court of Chancery.—*Morgan* v. *Lariviere*, L. R. 7 Ch. App. 550; 7 H. L. 423.

The Presidency Banks Act XI of 1870 directs that, except for the purpose of excluding the provisions of section 17 which relate to the forfeiture of stock and shares, the banks shall not be bound or affected by notice of any trust to which any stock or share may be subject in the hands of the proprietor or holder. Similarly the Indian Companies' Act, 1882, section 53, provides that no notice of any trust express, implied or constructive shall be entered on the register, or be receivable by the Registrar in the case of Companies under the Act and registered in British India.

Lord MACAULAY then Mr. MACAULAY and his brother Indian Law Commissioners, Mr. MACLEOD of Madras, Mr. ANDERSON of Bombay, and Mr. MILLETT of Bengal, were of opinion (which they were the first to reduce to practice,) that illustrations would greatly facilitate the understanding of the law and would, at the same time, often serve as a defence of the law. In their report, (bearing date, 14th October 1837), prefixed to their new Penal Code, they thus wrote:

(1.) "In our definitions we have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision and of using harsh expressions, because we could find no other

expressions which would convey our whole meaning and no more than our whole meaning. Such definitions standing by themselves might repel and perplex the reader, and would perhaps be fully comprehended only by a few students after long application. Yet such definitions are found and must be found in every system of law which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions, and by avoiding them, he will give a smoother and more attractive appearance to his workmanship. But in that case he flinches from a duty which he ought to perform and which somebody must perform. If this necessary but most disagreeable work be not performed by the lawgiver once for all, it must constantly be performed in a rude and imperfect manner by every Judge in the empire, and will probably be performed by no two Judges in the same way." "The illustrations will lead the mind of the student through the same steps by which the minds of those who framed the law proceeded and may sometime show that a phrase which struck him as uncouth, or a distinction which he may have thought idle, was deliberately adopted for the purpose of including or excluding a large class of important cases."

(2.) On the other hand "a loosely worded law is no law," and to whatever extent a legislature uses vague expressions to that extent it abdicates its functions and resigns the power of making law to the Courts of Justice. On the whole we are inclined to think that the best course is that which we have adopted. We have, in framing our definitions, thought principally of making them precise and have not shrunk from rugged or intricate phraseology when such phraseology appeared necessary for the purpose of precision. If it appeared that our language was likely to perplex an ordinary reader, we added as many illustrations as we thought necessary for the purpose of explaining it. The definitions and enacting clauses contained the whole law. The illustrations make nothing law which would not be law without them. They only exhibit the law in full action and show what its effects will be on the events of common life. Thus the Code will be at once a Statute Book and a collection of decided cases. The decided cases in the Code will differ from the decided cases in the English law-books in two most important points. In the first place, our illustrations are never intended to supply any omission in the written law, nor do they ever, in our opinion, put a strain upon the written law. They are merely instances of the practical application of the written law to the affairs of mankind. Secondly, they are cases decided not by the Judges, but by the legislature by those who make the law and must know more certainly than any Judge can know what the law is which they mean to make."

"The power of construing the law in cases in which there is any real reason to doubt what the law is amounts to the power of making the law. On this ground the Roman Jurists maintained that the office of interpreting the law in doubtful matters, necessarily belonged to the legislature. The contrary opinion was censured by them with great force of reason, though in language perhaps too bitter and sarcastic for the gravity of a Code. "Eorum vanam subtilitatem tam risimus quam corrigendam esse censuimus. Si enim in præsenti leges condere soli imperatori concessum est et leges interpretari solo dignum imperio esse oportet. Quis legum enigmata solvere et omnibus aperire idoneus esse videbitur nisi is cui legislatorem esse concessum est? Explosis itaque his ridiculosis ambiguitatibus tam conditor quam interpres legum solus imperator juste existimabitur."

We have made these extracts in order to manifest the intention of the gentlemen who compiled the materials and framed them into Codes. But intention is one thing achievement is another. Did the codifiers succeed. In a great measure they did. But a Code may be deficient not only by omission of cases which the codifiers admit may be charged against their own compositions. They may be deficient in covering only a portion of the ground to which they extend. They may fail to recognise rights of the plaintiffs or defences which not only natural law but the Municipal law of the country protector allow, see the letter of COCKBURN, Lord Chief Justice of England. We therefore think that MACAULAY and his able coadjutor passed the line of literary courtesy and political justice and transgressed in applying to Judges in England and India a sneer by which Justinians courtiers endeavoured to elevate their master not only above all Councils but above the law itself.

Trust of immoveable property.

5. No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of moveable property.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

Commentary.

Mr. Griffith in his Institutes of Equity, pp. 31, 32 thus describes:

EXPRESS TRUSTS.—Trusts which depend on intention are some express, others implied. Trusts which depend on a rule or presumption of equity independent of intention are called constructive.

In order to obtain an adequate notion of the importance of express trusts, the student should inspect some good collection of conveyancing precedents. He will there find forms in connection with marriage settlements and wills for such dispositions of land, consols and other personalty for the benefit of wife, husband, and children, as may alleviate the losses of bankruptcy and death.

In settlements of land are to be found trustees possessing a legal estate, in order, not as formerly to preserve the contingent claims of unborn issue, for this is done by 8 & 9 Vic., c. 106, but to protect the property against waste, and prevent undue influence by the tenant for life. Also trusts of long terms of years. These being personalty are not affected by the devolution of the inheritance, and are very useful for raising portions for younger children, jointure for the wife, or to secure the repayment of money borrowed on mortgage. An assignment of a long term frequently afforded a protection to persons who had paid a valuable consideration for an estate without notice of an intermediate, and perhaps dormant, claim. Such terms, after 31st December, 1845, being already attendant upon the inheritance or reversion, or becoming satisfied, were and are, by 8 & 9 Vic., c. 112, made to cease.

Trusts of sale and conversion of realty and personalty are also common: of realty to create a fund for payment of debts, or debts and legacies, and administration expenses; of both for the better distribution or arrangement of property in a family settlement.

Another important class of express trusts are those contained in composition deeds under the Bankruptcy Act, 1861, and arrangement and inspectorship deeds not dependent on the Act.

In fact, trusts are infinite in purpose, and varied in form as business requires. Modus et conventio vincunt legem. That is, not that all trusts are lawful, but provided the settlor avoids trusts forbidden by the policy of the law, he may modify his dispositions as he pleases.

Express trusts are created by a common law conveyance of the estate, with an appointment of a trustee, who holds the estate as a mere depositary, or to perform some duty of administration. The latter trusts are called special, and are not within the Statute of Uses. (2.) They are also created by a conveyance under the statute,

which contains a use or trust additional to the one turned into the legal estate. (3.) They also arise where property is conveyed to a second person, upon the promise that he will devote it to the benefit of a third person. (4.) Where the second person merely acquiesces in such an arrangement. (5.) Where a person declares himself a trustee for another.

The Transfer of Property Act, chapter II, section 5, thus defines the phrase "transfer of property." In the following sections "transfer of property" means an act by which a living person conveys property in present or in future to one or more living persons, or to himself or one or more other living persons and to transfer property is to perform such act. Section 9 of the same Act enacts that "A transfer of property may be made without writing in every case in which a writing is not expressly required by law."

A man may transfer his property without valuable consideration in one of two ways. He may either do such acts as amount in law to a conveyance or assignment of the property and thus divest himself of the ownership at law; in which case the person who by these acts acquires the property takes it beneficially or on trust. Or the legal owner of the property may by one or other of the modes recognized as amounting to a valid declaration of trust constitute himself a trustee and without an actual transfer of the legal title so deal with the property as to deprive himself of the beneficial ownership and declare that he will hold it from that time forward on trust for the other person. It is true that he need not use the words "I declare myself a trustee," but he must do something which is equivalent to it and use expressions which have that meaning. *Per* Sir G. JESSEL, L. R. 18 Eq. 14 cited with approbation by SARGENT, C.J., in *Hirbai* v. *Jan Mahomed Kaladin*, I. L. R., 7 Bom. 229, 250. Sir G. JESSEL has failed to notice the cases where the owner of equitable property intends to create a trust thereof. See Griffith's Institutes of Equity, p. 34.

"The equitable doctrine of the transfer of ownership by acknowledgment of trust when it is sought to establish it by oral evidence requires to be applied in this country with the greatest caution, and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties, speaking as to conversations which took place seventeen years ago without the corroboration derived from other evidence pointing irresistibly to the same conclusion would be to introduce a most dangerous mode of appreciating evidence and would offer a direct encouragement to perjury."—A.D. 1881. Sir C. SARGENT, C.J., in *Hirbai* v. *Jan Mahomed Kaladin*, I. R. 7 Bom. 229. See also *Ashabai* v. *Haji*

Tyeb Hazi Rahimtulla, I. L. R., 9 Bom. 115. This last case though reported in 1885 was decided in February, 1882. The Indian Trusts Act came into operation the first day of March, 1882, generally.

In accordance with Act III of 1877, which is in force throughout the whole of India under British administration, assurances are divided into two classes, those of which registration is compulsory, and those of which it is optional. The former class consists of (1) deeds of gift and other non-testamentary documents including receipts affecting the disposition of immoveable property of the value of 100 rupees, or upwards; (2) leases of immoveable property for any term exceeding one year. The latter class consists of (1) such deeds, documents and receipts when the value is less than 100 rupees, or the term one year or less; (2) instruments affecting the disposition of moveable property; (3) wills; (4) all other documents of which registration is not compulsory.—Moral and Material Progress of India, 1882, 1883, p. 82, printed by order of House of Commons 1885:

"As regards moveable property beyond the limits of the ordinary original civil jurisdiction of the High Courts whether belonging to European British subjects, Hindus or Mohommetans, trusts may be declared by parol."—Agnew, p. 51.—*Hurpurshad* v. *Sheo Dyal*, L. R. 3 I. A. 259. Some lawyers, however, think that the Statute of Frauds, 29, Charles II, c. 3, requires a trust declared respecting such lands to be by writing.—*Sirdar Sainey* v. *Piran Singh*, I. L. R., 3 All. 466. The rules respecting trusts within the civil jurisdiction of the High Courts, created by Europeans before the passing of the present Act, are, that "all declarations and creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing to be signed by the party who is by law enabled to declare such trusts or by his last will in writing, or else they shall be of none effect."—Statute of Frauds, section 7. This rule requiring only proof by writing differs from that of the Indian Trusts Act which requires the declaration to be in writing. It also differs in that it does not include moveables or chattels personal. It is similar in including chattels real. Parol declarations in any case are very hazardous owing to the treachery of memory and the difficulty of interpreting an obscure intention. A father put a cheque into the hands of his son, an infant of nine months old, (the nurse asking if he had a present for it) and said, "I give this to baby for himself." He then took back the cheque and put it away. He also expressed his intention of giving the amount of the cheque to his son; shortly afterwards he died, and the document was found still uncashed. The English Judges differed as to whether there was an absolute gift or declaration of trust or neither—Griffith's Institutes of Equity, p. 33. In regard of trusts of moveables to take effect after

death, there appears to be no special rule of Hindoo or Mahommedan Law forbidding them. In regard of European subjects governed by the Statute of Frauds it is to be remarked that all devises of lands are required to be in writing and signed by the testator, or by some person in his presence and by his direction and to be attested or subscribed in his presence by three witnesses (section 5); and that all bequests of personal estate are required to be in writing with the exception of certain specified cases in which nuncupative wills by soldiers are allowed (section 19). Both the real and personal property are treated of absolutely and as including not only the legal, but also the beneficiary interest. The two interests therefore fall within the requirements that the testator whether he devise or bequeath must do so by writing. The Statute therefore aims at preventing the creation by a testator of trusts by parol. But the desire of equity to prevent fraud is paramount in the mind of the Judge and also of the legislator over the express regulations of the Statute. Accordingly as in cases of equitable mortgages and of specific performance of contracts for the sale of land, the statutory requisites of written evidence are disregarded, (Griffith's Institutes, pp. 129 and 112) lest fraud should be perpetrated by observing such requisites: so in the cases of last wills and testaments, trusts of land and of personalty may result from the conduct of the testator and devisee or legatee, but in favour of other objects than those intended to be benefited by the wrong doing testator and his donee. And yet a writing declaring a trust though not attested by witnesses may be effectual if incorporated by reference in the will, as indeed may any other more formal document. As these doctrines affect other wills as well as those which operate under the Statute of Frauds, it is of utility to set out illustrative cases. A testator devised an estate, and the testator so far as appeared on the face of the will was intended to take the beneficial interest, and the testator also left a declaration of trust not incorporated and not attested duly, and not communicated to and not assented to by the devisee in the lifetime of the testator. The devisee having done nothing wrong was held entitled to both the legal and beneficial interest, the informal declaration of trust being inadmissible in evidence and the estate being well devised.—*Addington* v. *Cann*, 3 Atkins, 141. Where the devisee is by the will characterised as trustee and the trusts are declared only by an unattested paper not incorporated in the will, the devisee was held a trustee for the heir at law to whom resulted the beneficial interest intended for another beneficiary.—*Muckleston* v. *Brown*, 6 Vesey, 52. A similar holding in respect of a bequest of personal estate occurs in *Johnson* v. *Ball*, 5 DeG. and Smale, 85. C made a will leaving his whole property real and personal to G whom he also appointed his executor. When about to die, C sent for G,

and in a private interview told him of the will, and on G's asking whether that was right, said, he would not have it otherwise. C then told G where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons to whom C wished sums of money to be given and annuities to be paid; but it contained several expressions as to G carrying into effect the intentions of the testator as he "might think best" and this sentence, "I do not wish you to act strictly on the foregoing instructions but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving, and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." G paid money to some of the persons mentioned in the letter but not to all. The House of Lords held that in this case there was not any trust created binding on G.—*McCormick* v. *Grogan*, L. R., 4 H. L. 82. The general maxim that "no man shall take advantage of his own wrong (Coke on Littleton, 148*b*) applies to these informal trusts and the wrong-doer is deemed a constructive trustee for others whenever being heir devisee or legatee or next-of-kin, he has contrived to secure for himself by fraud the succession of property intended for some one else. Should the owner of an estate be induced by his heir to believe that the heir will make a provision for the wife, child or mother of the owner, if he refrain from devising the estate and leave it to descend to the heir, the heir will be held a trustee notwithstanding the statutory law—*Stickland* v. *Aldridge*, 9 Vesey, 519. The same is the rule where the devisee has undertaken to hold on trust for another person. Should the promise be to execute an unlawful trust, there is, if possible, a stronger call upon the justice of the Courts to compel the devisee or legatee to divulge the facts and to constitute a resulting trust for the heir, next-of-kin or others.—*Bishop* v. *Talbot*, cited in 6 Vesey, 60. A devise or bequest to several may be void as to one to whom the testator's unlawful intention was communicated in his lifetime and good as to the others who were not privy to his intention.—*Tee* v. *Ferris*, 2 Kay & J. 357. The performance of the testator's wishes without having communicated with the testator in his lifetime will not avoid a trust.—*Lomax* v. *Ripley*, 3 Sm. & Gif. 142. Again, a testator may devise an estate to a trustee without stating the trusts in the will, and during his life the devisee may promise to perform the trusts declared to him orally or by letter. On cases within the first part only of the proposition, the Court would create a resulting trust for the heir. It is conceived that on principle the latter part of the proposition raises no equity against the heir, the cases on the

subject, *Pring* v. *Pring*, 2 Vern. 99; *Crooke* v. *Brooking*, 2 Vern. 50, 107; *Smith* v. *Attersoll*, 1 Russ. 266; *Podmore* v. *Gunning*, 6 Sim, 644, do not conclude the controversy. A testatrix who had by will and three codicils made a complete disposition of her real and personal property, afterwards executed a fourth codicil in the following words: "I hereby bequeath to B (to whom I have willed my landed property), also all my personalty such as cash, furniture, &c., to be applied as I have requested him to do." B gave evidence that before executing this codicil, the testatrix had stated to him the alterations she desired to make in her will, and that he had made a pencil memorandum of her various fresh bequests repeating each item to her, and that except so far as to give effect to the new wishes so stated to him, the testatrix did not intend to alter her previous dispositions. The memorandum was not signed by the testatrix. H, one of two joint beneficiaries of furniture, mentioned in the memorandum, attested the execution of the fourth codicil. HALL, V. C., held (1) that the words "such as cash, furniture, &c.," did not cut down the words "all my personalty," and that the fourth codicil comprised and gave to B as trustee the entire personalty; (2) That the nature of the trust was sufficiently established by the evidence of B, and that being so established, the Court would give effect to it; (3) That B held the personal estate in trust to carry out the dispositions of the will and first, second and third codicils with the alterations effected by the new dispositions specified in his evidence; (4) That if the Court could not have given effect to the intended trusts, then as the fourth codicil contained no express revocation of the will and three first codicils, but was executed in order to create new interests which had failed the original dispositions in the prior instruments would have remained in operation; (5) That as H had attested the fourth codicil, her beneficial interest under the parol trusts failed just as it would have done had the trust been declared in the codicil and that the whole beneficial interest in the furniture belonged to the other joint beneficiary.—*In re Fleetwood*, 15 Ch. D. 594.

Mr. Justice KAY, *in re Boyes*, 26 Ch. D. 535, stated as a general proposition that "if it had been expressed on the face of the will that the defendant was a trustee, but the trusts were not thereby declared, it is quite clear that no trust afterwards declared by a paper not executed as a will, could be binding and cited as his authorities.—*Johnson* v. *Ball*, 5 DeG. & Sm. 85; *Briggs* v. *Penny*, 3 Mac. & Gor. 546; *Singleton* v. *Tomlinson*, 3 App. Cas. 404. In the case before him a testator had instructed his solicitor to prepare a will leaving to the solicitor all the property absolutely but to be held and disposed of by him according to directions in writing to be subsequently given. His instructions as to the will were obeyed. Such

directions were not given to the solicitor personally in the lifetime of the testator. After his death, an unattested paper was found in which the testator expressed his wish that X Y should have all his property except a small sum of money which he gave to the solicitor. The solicitor claimed to act according to the unattested writing. The learned Judge held that as the testator had not in his lifetime communicated to the solicitor the object of the trusts, no valid trust in favour of X Y had been created, and that there was a constructive trust in favour of the testator's next-of-kin. If an executor is not to take beneficially but is stamped with the character of trustee and there be no next-of-kin, the Crown takes.—*Mary Hudson's Trusts*, 52 L. J., N. S. Ch. 789. Where the donee has a mere discretion an arbitrary power, the Court will not convert him into a trustee.—*Irvine* v. *Sullivan*, 8 L. R. Eq. 673; *Norris* v. *Frazer*, 15 L. R. Eq. 318; Griffith's Institutes, pp. 52—56. As to the burden of proving a secret trust, see *Jones* v. *Badley*, L. R., 3 Ch. App. 362.—*Rowbotham* v. *Dunnett*, 8 Ch. D. 430.

A testator devised the residue of property not applicable for charity because certain statutory provisions could not be complied with to A & B. A bill was filed to set aside the devise on the ground that it was made upon a secret trust for charity. CAIRNS, L. C. reversing the decision of the Master of the Rolls held that the onus lay upon the plaintiff to prove that such a trust was communicated to and expressly or tacitly accepted by the devisees.—*Jones* v. *Badley*, L. R. 3 Ch. App. 362. In this case *Wallgrave* v. *Tebbs* (2 K. & J. 313), was approved and it was followed in *Rowbotham* v. *Dunnett*, 8 Ch. D. 430, where it was also held that though the assent of a joint tenant to a secret trust might avoid the devise to another joint tenant, it would not affect a tenant in common. In *Moss* v. *Cooper*, 1 J. & H. 352. WOOD, V. C. on a Bill by heir-at-law and next-of-kin against residuary devisees respecting a secret trust without calling for a reply, said, he must decide the case in favour of the plaintiffs. No doubt, for the creation of a trust there must not only be an expression of the testator to that effect, but knowledge on the part of the trustees of such intention and acquiescence, or at least not a refusal, by them to accept the trust. If the devisees were wholly ignorant of the intention, then the Statute of Frauds would be contravened by fastening a trust upon the property by mere parol evidence. At the same time the devisees as soon as ever they heard of the purpose of the testator were bound to state whether they would accept the condition or not. If they said nothing, they must be taken to have accepted the trust and undertaken the confidence. His Honour, after referring to the evidence at great length, held that the defendants were clearly fixed

with knowledge of the testator's intention [by a communication before his death] and had with this knowledge accepted the devise and acquiesced in those intentions. It was also established that Gawthorne had full authority from the testator to make this communication to them and that a trust had been so clearly created that not one of these legatees would have been allowed to apply a single six-pence to his own use.—*The Times*, L. R., 28th February, 1861.

Creation of trust.

6. Subject to the provisions of section five, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust (*c*) the beneficiary, and (*d*) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.

Illustrations.

(*a*) A bequeaths certain property to B, "having the fullest confidence that he will dispose of it for the benefit of" C. This creates a trust so far as regards A and C.

(*b*) A bequeaths certain property to B, "hoping he will continue it in the family." This does not create a trust, as beneficiary is not indicated with reasonable certainty.

(*c*) A bequeaths certain property to B, requesting him to distribute it amongst such members of C's family as B should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(*d*) A bequeaths certain property to B, desiring him to divide the bulk of it among C's children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.

(*e*) A bequeaths a shop and stock-in-trade to B, on condition that he pays A's debts and a legacy to C. This is a condition, not a trust for A's creditors and C.

Commentary.

"The second class of trusts consists of what are called Implied Trusts." These depend upon a presumed or implied intention. "The implication," Mr. Griffith writes (Institutes of Equity, pp. 51, 52), "involving the construction of defective documents, or the interpre-

tation of ambiguous business transactions—this class, though not so numerous as the first, is not without its difficulties.

Extrinsic or parol evidence is not admissible to rebut trusts implied on construction of written instruments. It is admissible when the implication rests on a presumption of equity from the general circumstances of the case. Yet here care must be taken to exclude evidence of expressions of intention of a later date than the actual creation of the trust relation.

I. Words precatory and recommendatory, as in the Roman law they might (*a*), so with us they may, create a trust (*b*).

II. Debts and legacies are frequently made a charge upon realty by an expression of intention that they should be paid. But if the payment is directed to be made by the executor, in whose hands the personalty is the proper fund, the charge may not arise. Where a will contains only a residuary devise a charge is created.

III. Where a person covenants or creates a trust for the purchase of lands to be settled, lands purchased will, pro tanto, be bound.

Thus A covenants on his marriage to purchase lands of 200*l.* a year, and settle them for the jointure of his wife, and to the first and other sons of the marriage in tail. He purchases lands of that value, but makes no settlement, and on his death the lands descend to the eldest son. On a bill filed by the eldest son for a specific performance of the contract, it was held, that the lands descended were a satisfaction of the covenant (*c*).

IV. Where a person covenants to settle a sum of money, a distributive share under an intestacy will be deemed a performance (*d*).

Thus A covenants, previous to marriage, to leave his intended wife 620*l.* The marriage takes place, and he dies intestate; the wife's share comes to above 620*l.*; this is a satisfaction.

The covenant is not satisfied by the mere insertion of such a bequest in the covenantor's will, nor by an appointment, under a power to appoint to children, contained in the convenantor's marriage settlement, the covenantee being such a child (*e*). A bequest by will is not a payment, but *primâ facie* a gift. To discharge the obligation in the second mode would be a fraud on the power.

(*a*) "Verba autem fideicommissorum hæc maxime in usu habentur: peto, rogo, volo, mando, hæc fidei committo, quæ perinde singula forma sunt atque si omnia in unum congesta essent."—Justinian's Institutes, II. 24, 3. "Sane in fideicommissis voluntas magis quam verba plerumque intuenda est."—Code VI. 42, 16.

(*b*) Eaton *v.* Watts, 4 Eq. 151.

(*c*) Wilcocks *v.* Wilcocks, Cowper, L. K., 2 Vernon, 558.

(*d*) Blandy *v.* Widmore, Cowper, L. K., 1 P. Wms., 323.

(*e*) Graham *v.* Wickham, J. (63), 702, L. J.

V. Where a beneficial gift, devise or bequest is made subject to a trust which leaves a surplus, such surplus goes to the donee, devisee or legatee; but where the legal estate merely was given, then the equitable interest, or so much of it as is left undisposed of, will result to the settlor and his real or personal representative."—Griffith's Institutes of Equity, pp. 51, 52.

"Absolutely trusting" was held imperative in *Irvine* v. *Sullivan*, L. R. 8 Eq. 673. Though "well know," had received a like efficacy in *Briggs* v. *Penny*, 3 Mac. & G. 546, such efficacy is now open to controversy.—*Stead* v. *Mellor*, 5 Ch. D. 225; *In re Fleetwood*, 15 Ch. D. 594. A trust was created by the expression "I would wish she should have power to give."—J. R. 7 Eq. 456.

The Courts have refused to construe a bequest to be a trust where the property was placed "in the entire power" of a legatee.—*Eaton* v. *Watts*, L. R. 4 Eq. 151; "left entirely to his good judgment."—*M'Cormick* v. *Grogan*, L. R. 4 H. L. 82; given "to his wife to be used by her in such ways and means as she may consider best for her own benefit and that of her three children."—*M'Alinden* v. *M'Alinden*, I. R. 11 Eq. 219; "to be at her disposal in any way she may think best for herself and family."—*Lambe* v. *Eames*, L. R. 6 Ch. App. 597; where the testator "well knew" "her sense of justice and love to her family" feeling perfect confidence that she would manage the same to the best advantage for the benefit of her children."—*Greene* v. *Greene*, I. R., 3 Eq. 90; desired that the legatees should "distribute such residue as they thought would be most agreeable to his wishes."—*Stead* v. *Mellor*, 5 Ch. D. 225 (*d*). The words "quite at liberty to distribute what" she pleased, did not make a wife a trustee, because the quantity of the property was left uncertain. —*In re Bond*, 4 Ch. D. 238. A devise and bequest of all his real and personal estate unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns "in full confidence that she would do what was right as to the disposal thereof between his children either in her lifetime or by will after her decease" gave an absolute interest unfettered by a trust.—*In re Adams and the Kensington Vestry*, C. A. 27 Ch. D. 395.

Where absolute discretion has been given to trustees as to the exercise of a power, the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it.—Jessel, M. R., 21 Ch. D. 271.

A testator directed that a debt due to him by an attesting witness of his will should not be claimed, demanded, nor enforced, but that his wish was that the sum should be specifically devoted to the education of the children of such attesting witness. MUTTUSAMY AYYAR, J., held, that there was no release of the debt or legacy to the attesting witness, but a valid trust in favour of the children.—*A. G.* v. *Lazar*, I. L. R. 4 Mad. 244.

Seeing that the construction of a will regarding the creation of a trust or otherwise depends upon the language and possibly upon the circumstances of the particular will *Briggs* v. *Penny*, supra, is not conclusive even where the words are identically the same; neither is any of the other cases already cited.—*Stead* v. *Mellor*, 5 Ch. D. 225. Still the principle stated by Lord Chancellor TRURO, in *Briggs* v. *Penny* is authoritative. It is this: "I conceive the rule of construction to be that words accompanying a gift or bequest expressive of confidence or belief, or desire, or hope, that a particular application will be made of such a bequest will be deemed to import a trust upon these conditions—first, that they are so used as to exclude all option or discretion in the party who is to act as to his acting according to them or not; secondly, the subject must be certain, and thirdly, the objects expressed must not be too vague or indefinite to be enforced." In *Stead* v. *Mellor*, JESSEL, M. R., approved the principle but doubted whether the Lord Chancellor was correct in making the words "well knowing" create a trust. In that case the testatrix gave all her personal estate to trustees upon trust after payment of her funeral and testamentary expenses, debts and legacies to hold the residue "in trust for such of my nieces A & B, as shall be living at my death, my desire being that they shall distribute such residue as they shall think will be most agreeable to my wishes." A & B both survived the testatrix. Held, that they took the residue for their own benefit. In a suit by a widow of a deceased talookdar against another widow and her transferee of a talook for a declaration of the plaintiff's right to succeed to the estate in dispute after the death of the first defendant, the latter pleaded that by a settlement made with her summarily in 1858, a sunnud granted in 1861 and the entry of her name on the first and third lists prepared under section 8 of Act I of 1869 she had under section 9 an absolute estate with full power of alienation. Held, that the defendant had by her acts and declarations constituted herself a trustee for the purpose of carrying into effect the will of her husband and that thereunder the plaintiff was entitled to the declaration sought.—*Thakurain Ramanund Koer* v. *Thakurain Raghunath Koer*, L. R. 9 I. A. 41.

A recital in a deed is only an estoppel in an action upon the deed.—*Carter* v. *Carter*, 3 K. & J. 617.

Formerly in order to render a recital in a deed effectual as an estoppel it was necessary to add some such clause as the following "as he doth hereby admit and acknowledge." Such formal technicality is not now necessary.—*Bowman* v. *Rostron*, 2 A. & E. 295; *Gwyn* v. *Neath Canal Co.*, L. R., 3 Ex. 209. *In re Carter's Trust*, L. R., 3 Eq. 495. In *Brooke* v. *Haymes*, L. R. 6 Eq. 25.

Seeing that an estoppel must be certain to every intent, suppositions and facts not precisely or directly alleged constitute no estoppel and a party is not estopped where the truth appears by the same instrument.—Doe d. *Butcher* v. *Musgrove*, 1 M. & Gr. 625; *Heath* v. *Crealock*, L. R. 10 Ch. App. 22.

A document which is of a testamentary nature but invalid for want of execution, cannot be enlarged or converted into a declaration of trust.—*Warriner* v. *Rogers*, L. R. 16 Eq. 340.

In an English Court of Equity a declaration of trust is considered as equivalent to a transfer of the legal interest in a Court of law, and when the transaction by which the declaration is created is complete, it will not be disturbed for want of a consideration.—*Kronheim* v. *Johnson*, 7 Ch. D. 60.

Accordingly a declaration of trust by the equitable owner of a chose in action as of a bond vested in trustees was supported in. *Collinson* v. *Patrick*, 2 Keen, 123.

Some Judges have held that to amount to a declaration of trust which appears according to the ordinary rules of construction to amount to nothing more than an imperfect transfer. The law, however, is now of a stricter character, see *Milroy* v. *Lord*, 4 DeG. F. & J. 264, and *Richards* v. *Delbridge*, L. R., 18 Eq. 11. In the latter case J. Delbridge was possessed of leasehold premises for business-purposes and stock in trade. Shortly before his death, he endorsed and signed a memorandum on the lease "This deed and all thereto belonging, I give to E. B. Richards, from this time forth with all the stock in trade." He then delivered the lease to the mother of E. B. Richards who was his grandson and helped him in the business. JESSEL, M. R., held that there was no valid declaration of trust of the property and adopting the observations of TURNER, L. J., in the former case said, "A man may transfer his property without valuable consideration in one or two ways, he may do such acts as amount in law to a conveyance or assignment of the property and thus completely divest himself of the ownership in which case the person who thus acquires the property takes it beneficially or on trust as the case may be, or the legal owner may by one of the ways recognised as amounting to a valid declaration of trust constitute himself a trustee and without an actual transfer of the legal title may so deal with the

property as to deprive himself of the beneficial ownership and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it and use expressions which have that meaning." However in questions of intention, different Judges place different interpretations upon the words employed.—*Baddeley* v. *Baddeley*, 9 Ch. D. 113; *Fox* v. *Hawks*, 13 Ch. D. 822; *Breton's Estate*, 17 Ch. D., 416.

Frequently it is necessary to distinguish a trust from a power, or a trust coupled with a power or a simple gift.—Griffith's Institutes of Equity, p. 53.

Where there is a power to appoint part of a settled fund, the execution of the power takes the part appointed entirely out of the settlement; although, therefore, the beneficial interest in it is not in terms immediately disposed of, yet there can be no resulting trust for the benefit of any person under the deed creating the power; for where the principal of a fund is appointed it must be considered as if it had never been comprised in the trust, because it is absolutely taken out of it by the execution of the power. Therefore, where a wife, under a settlement of her personal property, which was settled on herself and her husband and the survivor, and was afterwards to be laid out in land to be settled on the heirs of her body by him, remainder to the survivor in fee, had a general power to appoint 1,500*l.*, part of the money, and she did appoint it to a trustee, to pay to her nieces 1,500*l.* and 500*l.* respectively when twenty-one or at marriage; it was held, that the sum was wholly taken out of the settlement, and that there was no resulting trust, and the trustee having the whole capital money in his hands for the benefit of the *cestui que trust*, the capital would draw the interest with it.—*Harding* v. *Glyn*, 1 Atk. 469; *Weller* v. *Ker*, L. R. H. L. 1 S. & D. 21; 1 Sc. App. 11.

The Court cannot execute a power where the donee declines to do so. But in laying down this broad rule, we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. "Powers," as Chief Justice WILMOT observed, "are never imperative. They leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, equity, on the general rule that the trust is the land will carry the trust into execution at the expense of the remainder-

man, and without any regard to the person in whose favour it is to be executed being a mere volunteer, and not a purchaser, creditor, wife or child. This is the case where a power is given by a will to trustees to sell an estate and apply the money upon trusts. The power is in the nature of a trust. The legal estate, until the execution of the power, of course descends to the heir at law, and if the power be defeated at law by the death of the person to whom it was given, the legal estate would remain in the heir at law for his own benefit; but Equity, acting upon the trust, will compel the heir to join in the sale of the estate for the purposes designated by the testator.—Griffith's Institutes of Equity, p. 54.

On the other hand, the discretion to be exercised in the execution of a power must be distinguished from the bare trust: *e. g.*, a testator devised real estate to trustees, and gave them a power of granting leases for the term of twenty-one years. The trustees disclaimed the trust, and the heir-at-law, who was tenant for life of a moiety, granted a lease: Lord Chancellor WESTBURY held that the lease was invalid.—*Robson* v. *Flight*, 4 DeG. J. & S. 608.

In *King* v. *Denison*, Lord ELDON pointed out the distinction between gifts by will *upon* trusts, and gifts by will *subject* to trusts. "If I give to A and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purposes only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more, and the effect of those two modes admits just this difference: The former is the devise of an estate of inheritance for the purpose of giving the devisee the beneficial estate subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest."—1 Ves. & Bea. 272.

The analogy holds with respect to personal estate.—Griffith's Institutes of Equity, pp. 55, 56.

"In executory trusts the settlor leaves something to be done, the trusts to be executed in a more careful and accurate manner." TALBOT, L. C., in *Glenorchy* v. *Bosville*, Cas. Tem. Talb., 1 L. C. 1. Such trusts are frequently found in marriage settlements in which express executed trusts are created for the benefit of the parents and executory ones for the children. Of such arrangements, Lord Chancellor TALBOT said, "Where articles are entered into before marriage and a settlement is made after marriage different from those articles, the Court will set up the articles against the settlement, but where both articles and settlement are previous to the marriage at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them and shall control the articles.

And although in the case of *West* v. *Erisey*, Michaelmas, 1726, in the Court of Exchequer and afterwards in the House of Lords, 1727, 3 B. P. C. 377, the articles were made to control the settlement made before marriage, yet that resolution no way contradicts the general rule: for in that case the settlement was expressly mentioned to be made in pursuance and performance of the said marriage articles whereby the intent appeared to be still the sons as it was at the making of the articles.—*Legg* v. *Goldwire*, Cas. Tem. Talb., 1 L. C. 17. See also *Sackville West* v. *Viscount Holmesdale*, L. R. 4 H. L., 543 and *Grier* v. *Grier*, L. R 5 H. L. 688.

Johnson's Trusts, 2 L. R. Eq. 716 shows that in executed trusts doubtful words will not override usual canons of construction and suspend the interest until possession of the realty is acquired. Executed and executory trusts present some analogy to an executed lease and a lease to be made in pursuance of an agreement. In *Hodgkinson* v. *Crowe*, L. R. 10 Ch. App. 622, under an agreement for a lease to contain all usual customary minority clauses it was held that the landlord was not entitled to have inserted a proviso for re-entry on breach of any covenant other than the one for payment of rent.

Where trusts are so vague that they cannot be executed, where the declaration of them is omitted though an intention to create them is manifest, where they lapse or are void because of unlawfulness a trust of the property will result for the benefit of the owner originally entitled.

Illustration (*e*). As to conditional transfer, see Act III, 1882, sections 25—34. Section 26 enacts that "where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with."

The Government, by directing the Court of Wards to take charge of an estate during the minority of the next claimants, does not constitute itself a trustee for the rightful owner. The wrongful invasion or continuance in possession of a stranger whether with or without knowledge of the infirmity of his title will not make the wrong-doer a constructive trustee unless he has been admitted into possession by a trustee.—*Palkonda Zemindar* v. *Secretary of State for India*, I. L. R., 5 Mad. 91. The last proposition is too broad for the English law.

Who may create trusts.

7. A trust may be created—

(*a*) by every person competent to contract, and,

(*b*) with the permission of a principal Civil Court

of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

Commentary.

(*a*) "Person."—The word person in its primary signification is a human being who can have rights and so a human being with a capacity for rights. But this principal meaning is by a process of mental abstraction and imagination much extended in legal learning so that in regard of rights, many things besides human beings are accounted persons so far as it is considered and it may be, that they are special subjects of rights. On this extension of the primary meaning of the word depends the division into physical and moral persons of which the latter are more rightly named judicial or incorporeal persons such as municipal and trading corporations. The word frequently signifies only a quality by which any one has a competency for special rights and has to bear the burden of special duties: so that one individual may sustain several characters each distinguished by its own duties and rights. In this case in actions it is most important to consider by virtue of what character they are sustained and that rights in one character cannot prejudice those in another character. By a corporeal or real person is understood a human being viewed separately in respect of his ability to have rights on account of which the quality is ascribed to him of status which is either natural or civil. The personal rights which are summed up in the word *status* need not be enumerated here. They involve a consideration of the relations often of parent and child, of sanity, of legitimate marriages, and illegitimacy, of domicile and foreign residence, of ranks and professions, of Christianity and other religions and also the consideration of the loss of such rights by physical or civil death. See Mackeldey, sections 116—141.

The Contract Act IX, 1872, section 11, declares that "every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject." A person is said to be of sound mind for the purpose of making a contract if at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests, section 12. The Indian Majority Act, 1875, is to the effect that every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice and every minor under

the jurisdiction of any Court of Wards shall be deemed to have attained his majority when he shall have completed his age of twenty-one years, and every other person domiciled in British India when he shall have completed his age of eighteen years: section 3. But nothing contained in the said section 3 nor *semble* in the Contract Act, section 11 shall affect—

(*a*) the capacity of any person to act in the following matters: namely, marriage, dower, divorce and adoption;

(*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India, or,

(*c*) the capacity of any person who before the Majority Act came into force had attained majority under the law applicable to him.

"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind but occasionally of sound mind may make a contract when he is of sound mind. A person who is usually of sound mind but occasionally of unsound mind may not make a contract when he is of unsound mind." Act IX of 1872, section 10. In England drunkenness apart from fraud does not vitiate a contract. Illustration (*b*) to section 10 shows that the Law in India is now otherwise. It is thus worded: "A sane man who is delirious from fever, or is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts. The law generally presumes sanity, but lunacy being proved the burden of showing a lucid interval that is a restoration of a rational mind not merely the cessation of violent symptoms rests upon the allegant—*Hall* v. *Warren*, 9 Vesey, 611.

The capacity to enter into contracts and to make testamentary and other dispositions of property is not affected by hallucinations, illusions or delusions unless they influence the particular transaction even though they affect, the subject-matter of the property dealt with. From several judgments of the law Courts it appears that the test for unsoundness of mind refers less to the mere existence of delusion than to actual incapacity in the person from some morbid condition of intellect to manage his business. One condition without the other is not a sufficient test; for the intellect may be in a morbid state and yet there be no legal incompetency, or the incompetency may alone exist depending on bodily infirmity or want of education. A person may be legally incompetent to manage his own property, according to some and yet not reach the legal standard of lunacy or idiocy, for example, ladies of great age and no little imbecility. On

the other hand legal competency to transact business is not necessarily destroyed by "hallucinations" or sensations which are supposed by the patient to be produced by external impressions although no material objects act upon the senses at the time; by illusions or sensations produced by the false perception of objects or by a delusion which is an hallucination or illusion believed by the patient to have a positive existence which belief is not removed by reflection and by appeal to the other senses. Medically viewed such delusions are strong and perhaps conclusive evidence, where of any importance, of unsoundness of mind but they by no means without more render a person legally incompetent.

In *Smee* v. *Smee*, L. R. 5 P. D. 84, the President of the Probate Division of the High Court of Justice said, "A few years ago it was generally considered that if a man's mind were unsound in one particular, the mind being one and indivisible, his mind was altogether unsound, and therefore that he could not be held capable of performing such an act as the making of a will. A different doctrine subsequently prevailed, and this I propose to enunciate for your (that is the jury's) guidance. It is this. If the delusions could not be reasonably conceived to have had anything to do with the deceased's power of considering his relations' claims upon him and the manner in which he should dispose of his property, then the presence of a particular delusion would not incapacitate him from making a will." The testator had supposed himself to be a son of George IV, and had memorialized the Queen that his claim might be recognized. The cases to which the President alluded to as changing the law were *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549 and *Boughton* v. *Knight*, L. R. 3 P. & M. 64.

The cases just cited were approved by HALL, V. C. and the Court of Appeal from the High Court of Justice in *Jenkins* v. *Morris*, L. R. 14 Ch. D. 674. In that case a lessor at the time that he made a lease of a farm laboured under the delusion that it was impregnated with sulphur. On an issue directed as to the capacity of the lessor to make the lease rational letters by the lessor relating to the lease were put in evidence. The Judge did not tell the jury that the effect of the delusion was not displaced by the letters but directed them that it was a practical question whether the lessor was so insane as to be incompetent to dispose of his property though believed to be full of sulphur. The jury found that the lease was valid. The Courts held on a motion for a new trial that the Judge's direction to the jury was correct.

The Indian Succession Act of 1865 altered the then existing sections 4, 331, English law and ordered that no person shall, by marriage since January 1, 1866, become incapable of doing any act in res-

pect of his or her property which he or she could have done if unmarried. Marriages of persons resident in India, but both having domiciles elsewhere are excepted. Mr. Justice STRANGE's observation upon the position of Indian women are valuable: "To consider next the case of the wife and other dependent members of a man's family with reference to the power in question of contracting. As respects the wife it may be taken to be commensurate with her right of property as consisting in her stridhana, land excepted, the exception applying in the Bengal provinces only to such as may have been given her by her husband of which she certainly cannot dispose and with regard to which it follows that she cannot contract. Beyond this it is laid down generally in many places that for necessaries in support of her family, including herself, she may bind her husband by her contracts as a man's slave even has power to do according to Menu. The case usually put is that of the husband from home when it is but reasonable while the absence continues that an authority should subsist somewhere to provide for his family. It is in the absence of his master that Menu confers the right upon the slave. But absence in these texts is regarded as illustrative only, and accordingly Katyayana extends it to disability in the husband arising from any cause, as for instance, from incurable disease; including among necessaries for which provision may be made at his expense by others the nuptials of his daughter or disbursements for funeral rites. And all this, he says, may be done by his servant, his wife, his mother, his pupil, or his son without his assent, though in another text he supposes his assent to have been given unnecessarily as the law would imply it. But such implication may be rebutted by proof of his having withheld it or otherwise. In which case there could be no recovery against him, though it should appear that he had left his family destitute. In certain trades in which the wife is understood to have a special concern, she has a greater latitude, and universally as the management of the family is confided to her, he is bound by her contracts."—Hindu Law, 4th edition, 276.

The Indian Succession Act (X, 1865) section 4, abolished any further acquisition of property by marriage and gave as incident to the wife's new title a power of acting as a *feme sole*. She therefore may create a trust of real property. Under the Married Women's Property Act (III, 1874) section 4, a married woman may similarly create a trust of her gains and earnings. Neither of these Acts applies to Hindoos, Muhammedans, Buddhists, Sikhs or Jains. Section 2.

A married woman who is a Hindoo may create a trust of her separate property the stridhan. Those who hold that her interest in any property inherited by her from males ceased with her life necessarily forbid the creation of a trust therein by her after her death.

The author was formerly of opinion that her interest did not so cease; but though the decisions of the Privy Council are not consistent, the last is in favour of the ceasing.

Section 4. "The wages and earnings of any married woman acquired or gained by her after the passing of the Act in any employment, occupation or trade carried on by her and not by her husband, and also any money or other property so acquired by her through the exercise of any literary artistic or scientific skill, and all savings from and investments of such wages, earnings and property, shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings and property." Accordingly of this separate property, she may create a trust.

(*b.*) The words Principal Civil Court of Original Jurisdiction refer to the District Courts, but the powers of the Supreme Courts are not affected thereby.—*Mullick* v. *Mullick*, 10 B. L. R. 240.

In Bengal, Madras and Bombay the powers and names of the Subordinate Courts may vary. But in each Presidency the District Judges possess not only an appellate jurisdiction varying with the amount in dispute, but also a general original civil jurisdiction. The Code of Civil Procedure (Act XIV, 1882) section 2, thus defines the terms District and District Court. "District" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (thereinafter called a District Court) and includes the local limits of the ordinary civil jurisdiction of a High Court: every Court of a grade inferior to that of a District Court and every Court of Small Causes shall, for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court. See also Act IX, 1861; Madras Act V, 1865, section 4; Bengal Act VI, 1862, sections 10, 13; Bengal Act IX, 1879, sections 2, 10; Bombay Reg. II, 1827, section 56. The law of England relating to aliens has not been introduced into India, where they may acquire property and deal with it as freely as British subjects.—*Mayor of Lyons* v. *East India Company*, 1 Moo. I. A. 175.

In England forfeiture for felony and treason has been abolished, 33 & 34 Vic., c. 23. In India conviction for some crimes entails forfeiture as of course as to other crimes the Judges can make it part of the sentence. The Penal Code (XLV, 1860), section 60, carries the disabling effect of convictions still further, it enacts that "In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property except for the benefit of the Government until he shall have undergone the punishment awarded, or the punish-

ment to which it shall have been commuted or until he shall have been pardoned."

Mr. Mayne questions whether the section would intercept a Hindoo inheritance in Madras. However in Bengal where the Mitakshara is taken as the guide instead of the Daya Bhaga the law is otherwise. An estate had been forfeited for rebellion during the mutinies and was claimed for the son on death of the father, and on the ground that the father's rights only could be confiscated. The Court, however, held, that the father represents the whole estate and that the Mitakshara by which each son has by birth a property in the paternal estate is inconsistent with a custom according to which the estate is impartible and descends to the eldest son. COUCH, C.J. observed: "The plaintiff's case is in truth that only the eldest son becomes co-owner with his father which is not the law of the Mitakshara. Either all the sons must become so or none do and the right of the eldest is only to inherit on his father's death."—*Thakoor Kapilnauth* v. *The Government*, 22 Suth. 17, 13 B. L. R. 445. Section 217 of the Penal Code, 1860, makes a criminal offender of a public servant who disobeys a direction of law in order to save property from forfeiture.

Subject of trust.

8. The subject-matter of a trust must be property transferable to the beneficiary.

It must not be a merely beneficial interest under a subsisting trust.

Who may be beneficiary.

9. Every person capable of holding property may be a beneficiary.

Disclaimer by beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

Commentary.

The word "person" is commented on in the note to section 7.

Hence corporations for trade or a Municipal Government may be beneficiaries. Respecting mortgages made to the former, see The Indian Companies' Act, 1882, section 58. Aliens may be beneficiaries. And so may the Government. Persons convicted in public trial of certain offences forfeit their property, Act XIV of 1860, sections 62,

126, 127. Such property would include existing trusts, but it is open to argument whether the words of the present section altogether forbid the creation of trusts in favour of such persons after conviction, or whether it allows the creation of the trust subject to forfeiture of rents and profits during the time of sentence mentioned in the latter part of section 62 of the Indian Penal Code Act.

Notwithstanding the section persons not capable of holding property, for example, children may be beneficiaries.

In England Municipal Corporations cannot alienate their lands without the consent of Her Majesty's Treasury, 5 & 6 Will. IV, c. 76. This statute does not apply to India. And under the general law, corporations can create trusts of their property provided the objects be lawful.—*Mayor of Colchestor* v. *Lowten*, 1 V. & B. 226; *Evan* v. *Corporation of Avon*, 29 Beav. 144. Aliens may acquire freely and dispose of property in the same manner as British subjects in India. —*Mayor of Lyons* v. *East India Company*, 1 Moo. I. A. 175; *Sarkies* v. *S. M. Prosonnomoyee Dossee*, I. L. R. 6 Cal. 794. "The Government of India as it has the power of disposing of public property may convey such property to trustees if it think fit."—Tagore Lecture, A.D. 1881, p. 124.

Where infants are interested, the Court will interfere in the administration of the trust if an investment proposed is clearly unsafe. —*Bethell* v. *Abraham*, L. R. 17 Eq. 24, or if a discretion as to maintenance of children is not being properly exercised for their benefit. *In re Hodges*, L. R. 7 Ch. D. 754. Nevertheless the general rule is that injudicious conduct without bad faith is no ground for interference.—*Tabor* v. *Brookes*, L. R. 10 Ch. D. 273; *Camden (Marquis of)* v. *Murray*, L. R. 16 Ch. D. 170.

Who may be trustee.

10. Every person capable of holding property may be a trustee; but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

No one bound to accept trust.

No one is bound to accept a trust.

Acceptance of trust.

A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance.

Instead of accepting a trust, the intended trustee

Disclaimer of trust.

may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him.

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust.

Illustrations.

(*a*) A bequeaths certain property to B and C, his executors, as trustees for D. B and C prove A's will. This is in itself an acceptance of the trust, and B and C hold the property in trust for D.

(*b*) A transfers certain property to B in trust to sell it and to pay out of the proceeds A's debts. B accepts the trust and sells the property. So far as regards B, a trust of the proceeds is created for A's creditors.

(*c*) A bequeaths a lákh of rupees to B upon certain trusts and appoints him his executor. B severs the lákh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

Commentary.

"Every person," grammatically construed this section enables a corporation to undertake a trust.

Aliens may be trustees of either moveable or immoveable property, "An ordinary Municipal Corporation," remarked Lord ROMILLY, "has full power to dispose of all its property like a private individual and the burden of proof lies on the person alleging the contrary to establish the trust. The trust may be of two characters, it may be of a general character, or of a private and individual character. A person might leave a sum of money to a corporation in trust to support the children of B and pay them the principal at twenty-one. That would be a private and particular trust which the children could enforce against the corporation. The Banks of Bengal, Madras and Bombay excepting cases of forfeiture are not bound or affected by notice of any trust to which any stock or share may be subjected in the hands of the proprietor or holder, Presidency Banks' Act (XI of 1870), section 17. Females in India may be appointed trustees, but the inconveniences attending their acting in particular cases may raise or assist a presumption that they were to take beneficially. A *cestui que trust* though not absolutely incapacitated from being a

trustee for self and others is usually an unfit person for such office, the interest and duty being conflicting.—*Barnes* v. *Addy*, L. R. 9 Ch. App. 244; *Forster* v. *Abraham*, L. R. 17 Eq. 351. Relatives from being unable to resist the importunities of the *cestui que trust* and sometimes from worse causes should not be appointed. Trust property should not be left in the hands of one trustee. For purposes of safety and convenience, three trustees are preferable.—Lewin.

"Competent to contract," see note to section 6.

"Acceptance," see note to the interpretation clause, section 3.

There is no essential virtue or legal operation in a deed of disclaimer. It is a convenient method of preserving evidence that a donee has refused a gift or an office, which facts may be testified as effectually though not as conveniently for title in a conveyancer's chambers by an answer in Court or any other act, conduct or expression of the donee indicating an unequivocal refusal to accept the gift or the office. We give a short form which might be considerably lengthened by inserting recitals of the things disclaimed or a recital that the disclaimer of the office is not to operate upon the beneficial interests, and altering the disclaiming clause accordingly.

KNOW all men by these presents that I, A. B. of &c., have disclaimed and renounced and do hereby disclaim and renounce the offices of executor and trustee of the will of G. H. late of &c.,
(who died on the day of
A.D., 18) and all estates and powers thereby expressed to be given to or vested in me

In Witness, &c.

In re Gordon, L. R. 6 Ch. D. 531, real estate was devised to trustees upon trust to sell the proceeds being to form a mixed fund with the personal estate for payment of debts and legacies with divers trusts over, and the trustees were also nominated executors. They renounced probate and never acted in the trusts. The Master of the Rolls held that their conduct was conclusive evidence of disclaimer.

Act XX of 1863 does not require that a person appointed by a committee to be the trustee of a temple should be of any particular sect and though it may be desirable that the trustee of a temple should be of the sect to which the temple belongs, the appointment of a Sivite to be trustee of a Vishnuvite temple does not amount to an act of misfeasance, neglect or breach of trust on the part of the committee within the meaning of the Act, section 14.—*Gandavathara Ayyangar* v. *Devanayaga Mudali*, I. L. R. 7 M. S. 222.

CHAPTER III.

OF THE DUTIES AND LIABILITIES OF TRUSTEES.

Trustee to execute trust.

11. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation.—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (*a*) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and (*b*) in the case of debts not bearing interest, to make such payment without interest.

Illustrations.

(*a*) A, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(*b*) A, a trustee of certain land for X, Y and Z, is authorized to sell the land to B for a specified sum. X, Y and Z, being competent to contract, consent that A may sell the land to C for a less sum. A may sell the land accordingly.

(*c*) A, a trustee for B and her children, is directed by the author of the trust to land, on B's request, trust-property to B's husband, C, on the security of his bond. C becomes insolvent, and B requests A to make the loan. A may refuse to make it.

Commentary.

The word "duty" signifies that which a person owes to another or to the public generally that which a person is bound by any legal obligation to do or to perform.—Broom's Commentaries, B. III, ch. I. In logical phrase it is the correlative of a right belonging to another person. A liability is a state or condition of being actually or potentially subject to an obligation and is used either generally as including every kind of obligation, or in a more special sense to denote inchoate future unascertained or imperfect obligations as opposed to debts the essence of which is that they are ascertained and certain. Where there are two or more trustees, the liability of the one may be direct, that of the other or others collateral.

It is remarked, in his commentaries on the Common Law by Judge BROOM, "that the word duty signifies that which a person owes to another or to the public generally, that which a person is bound by any legal obligation to do or perform. Although that definition would include within the term duty the obligation to pay a debt or perform an agreement it is not usual to employ this term in reference to obligations purely *ex contractu*." It has been usual to call those duties which the Magistrate will enforce perfect duties, and those which though binding in conscience he will not, imperfect. —Machelder, S. J. R. H. U., section 11.

"Law" is defined by the best writers as the command of a Superior (Divine or human) on all his subjects in given circumstances to do or abstain from doing something which persons will be liable to punishment called the sanction of the law if they disobey. In the Municipal or civil law of a country, duty and right are reciprocal terms; no duty is imposed except in the interest of some specified person who thus has a right, and no right can exist except by imposing on another some duty.—Austin, Hunter, Holland. Liabilities may arise not only from an intentional breach of a duty, but also from a negligent performance of the same. In some cases accident error and ignorance of fact but not ignorance of law constitute a legal excuse. Insanity is not so much an excuse as a state which prevents the obligation of a duty arising.

The decision of a majority of Malabar Uralars or trustees was held binding upon a dissentient minority in *Teramath* v. *Lakshmi*, I. L. R. 6 Mad. 270.

Bankruptcy does not divest the trust estates or destroy the trustee's power, rights, liabilities and duties. Where however trust property has become mixed with the bankrupt's general property and cannot be distinguished, the *cestui que trust* cannot follow it

specifically and must prove like another creditor.—*Ex parte Dumas*, 1 Atkins, 231.

A solicitor who wilfully and maliciously advises a breach of trust or being himself a trustee commits the offence, may be struck off the roll of the officers of the Court.—*In re Hall*, 2 Jurist, N. S. 633. A solicitor is the legal agent of his principal, and the duties of an agent are not the same as those of an express trustee though like other persons he may, in certain circumstances, be treated by the Court as a constructive trustee.—In *Barnes* v. *Addy*, 9 Ch. App. 251. SELBORNE, L. C., said, "It is equally important to maintain the doctrine of trusts which is established in this Court and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them. Now, in this case, we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create the trust, clothe the trustee with a legal power and control over the property imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But on the other hand strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design of the trustee." The facts of the case were these. Two solicitors acting respectively for a surviving trustee and certain beneficiaries had advised against transferring a moiety of the estate to the husband and father of the beneficiaries as a sole trustee for them, but prepared the necessary deeds. The sole trustee misapplied the proceeds, but as the solicitors had no ground for suspecting a dishonest design in his appointment, and never had control of the property, they were exonerated.

A settlor covenanting to pay a sum of money to trustees does not thereby render himself a trustee, and a breach of such covenant will be barred by the Statute of Limitations.—*Stone* v. *Stone*, 5 Ch. App. 74. But trustees neglecting to enforce the covenant and their representatives will remain liable.—*Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514.

"The purpose of the Trust." That is the intention of its creator,

the end designed by him, the scope or purview manifested in or by the evidence.

"The directions of the author." "If a trustee follows the directions of the trust in subordination to the rules of equity, he will be considered to have discharged his duty."—Griffith's Institutes of Equity, p. 42. Where trustees are directed to invest in specified securities and none other, they may nevertheless invest in the securities prescribed by statute for the statute is paramount.—*In re Wedderburn*, 9 Ch. D. 112.

Trustee to inform himself of state of trust-property.

12. A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Illustrations.

(*a*) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(*b*) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case required.

Commentary.

The omission of a trustee to a marriage settlement to enquire for the title-deeds which he believed were with the solicitor preparing the settlement, but were really with the bankers of the husband and wife is negligence of such a character as to prevent him availing himself of the legal ownership to gain priority over the equitable charge of the bankers. His *cestui que trust* stands in no better position.—*Lloyds Banking Company* v. *Jones*, 29 Ch. D. 221.

Trustee to protect title to trust-property.

13. A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-

property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Illustration.

The trust-property is immoveable property which has been given to author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, the trustee's duty is to cause the instrument to be registered.

Commentary.

Section 10 of the Specific Relief Act which enacts that a person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure, adds the following explanation: "A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled."—Act I of 1877.

When leasehold houses are vested in a trustee on behalf of a tenant for life and remaindermen, it is the duty of the trustee to keep the property free from the risk of forfeiture by a breach of the covenant of the lease, and they are entitled to have the rents of the houses applied in keeping them in a proper state of repair. The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants in the lease, but are entitled to have them specifically performed. When a tenant for life of leasehold houses is allowed to receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the Court will, at the instance of one of the trustees, appoint a receiver of the rents for the purpose of enforcing the proper repair of the houses.—*Fowler* v. *Odell*, 16 Ch. D. 723.

In all suits concerning property vested in a trustee, executor, or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent the persons so interested and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties.

When there are several executors, or administrators, they all shall be made parties to a suit against one or more of them: Provided that the executors who have not proved their testator's will, and executors, and administrators, beyond the local jurisdiction of the Court, need not be made parties. Unless the Court directs otherwise the husband

of a married administratrix or executrix shall not be a party to a suit by or against her.—Code of Civil Procedure XIV of 1882, sections 437—439.

Trustee not to set-up title adverse to beneficiary.

14. The trustee must not for himself or another set-up or aid any title to the trust-property adverse to the interest of the beneficiary.

Commentary.

Amongst other authorities that may be cited for the proposition that a trustee cannot set up a title to the trust property; the following may be cited—*Portsmouth (Earl of)* v. *Fellows*, 5 Mad. 450; *Kennedy* v. *Daly*, 1 Sch. & Lef., 381; *A. G.* v. *Munro*, 2 DeG. & S. 163; *Suboodra Beebee* v. *Bikromadit Singh*, 11 S. D. A. 543. Neither can a trustee set up the title of a third person against the beneficiary.—*Newsome* v. *Flowers*, 30 Beav. 461. But he may refuse to deliver to the beneficiary property claimed absolutely by him, until the right of the third party is settled.—*Neale* v. *Davis*, 5 D. M. & G. 258.

Care required from trustee.

15. A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

Illustrations.

(*a*) A, living in Calcutta, is a trustee for B, living in Bombay. A remits trust-funds to B by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. A is not bound to make good the loss.

(*b*) A, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, B, then in credit. The rents are accordingly paid to B, and A leaves the money with B only till wanted. Before the money is drawn out, B becomes insolvent. A, having had no reason to believe that B was in insolvent circumstances, is not bound to make good the loss.

(*c*) A, a trustee of two debts for B, releases one and compounds the other, in good faith, and reasonably believing that it is for B's interest to do so. A is not bound to make good any loss caused thereby to B.

(*d*) A, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. A is bound to make good the loss caused thereby to the beneficiary.

(*e*) A, a trustee for B, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. A is bound to make good the loss thereby caused to B.

(*f*) A, a trustee for B of a policy of insurance, has funds in hand for payment of the premiums. A neglects to pay the premiums, and the policy is consequently forfeited. A is bound to make good the loss to B.

(*g*) A bequeaths certain moneys to B and C as trustees and authorizes them to continue trust-moneys upon the personal security of a certain firm in which A had himself invested them. A dies, and a change takes place in the firm. B and C must not permit the moneys to remain upon the personal security of the new firm.

(*h*) A, a trustee for B, allows the trust to be executed solely by his co-trustee, C. C misapplies the trust-property. A is personally answerable for the loss resulting to B.

Commentary.

It was decided *in re Speight*, 9 Ap. Ca. 1, that the employment without negligence of a broker in the ordinary course of business will not make the trustee responsible for a loss arising from embezzlement committed by the broker.

A broker who was employed by a trustee to buy securities of a municipal corporation which were authorised by the trust, gave the trustee a bought-note purporting to be subject to the rules of the London Stock Exchange. Upon a representation that the purchase-money was payable the next day which was the next account day on the London Exchange, he obtained it from the trustee. He appropriated it to his own use and subsequently became insolvent without having procured the securities. Some of the securities were procurable only from the corporations direct not being bought or sold in the market. There was evidence that the form of the bought note would have suggested the last mentioned fact to experts. However the House of Lords held, that there was no ground for suspicion in the mind of the trustee or of an ordinary prudent man of business, and that such payment to a broker was in accordance with the usual course of business. Accordingly they held that the trustee was not liable to the beneficiary for the loss of the trust fund. If the broker had represented to the trustee that the con-

tracts were for loans direct to the corporations and not for purchases in the market, the decision of the House of Lords would probably have been different from what it was.—*Speight* v. *Gaunt*, 9 App. Cas. 11.

Where trustees or executors in a proper case employ an agent to collect small debts, they will not, in the absence of their own wilful default, be liable on his insolvency. This rule of Equity has in England been incorporated in 22 & 23 Vic., c. 35, s. 31, which thereby throws upon the party seeking to charge the trustee or executor the burden of proof when the propriety of employing an agent has been established. SELBORNE, L. C.—*In re Brier*, 26 Ch. D. 243.

An executor having been informed by the solicitor that he had compromised two debts due to the estate for £310 sent him a cheque valued £310 which he misappropriated. It afterwards became irrecoverable but was allowed to the executor in taking the accounts.—*In re Bird*, L. R. 16 Eq. 203. But money handed by a trustee to a solicitor to invest and misapplied by him is not allowed.—*Bostock* v. *Floyer*, L. R. 1 Eq. 26; nor was money ordered to be paid to new trustees, which instead was paid into a bank that failed.—*Lunham* v. *Blundell*, 4 Jurist, N. S. 3.

As a general rule trustees for sale are not justified in employing a solicitor to receive the purchase-money. The purchaser is bound at his peril to know this rule though in cases of moral necessity as where the trustee is abroad, he may pay it to a solicitor. *In re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 403. A written authority from the trustee to the solicitor to receive it is not necessarily a justification of the purchaser in paying it to him.—S. C. 26 Ch. D. 387. The rule is the same where the trustees authorize the payment to one of themselves.—*In re Flower*, 27 Ch. D. 592.

A simple authority to lend on personal security does not justify a loan to one of themselves, or to a relation for the purpose of accommodating him—*Francis* v. *Francis*, 5 DeG. M. & G. 108; *Langton* v. *Ollivant*, G. Coop. 33; *Kershaw's Trusts*, L. R. 6 Eq. 322. Even an absolute discretion must be exercised reasonably and impartially and such investments as will favour a beneficiary for life at the expense of one in remainder must not for that account alone be sought.—*Stewart* v. *Sanderson*, L. R. 10 Eq. 26. But there being no investment clause in a will the trustees of realty and personalty in trust for A for life with remainder to his children were authorised by the Court to advance A part of the residuary personalty to stock and cultivate a farm part of the realty upon evidence being adduced that the outlay would be for the advantage of the infant remainderman.—*In re Household*, 27 Ch. D. 553; see also *in re Jackson*, 21 Ch. D. 786.

It is the duty of a trustee of a policy of assurance to give notice to the Assurance office of an assignment and to endorse the policy with a statement of the fact of assignment. Otherwise they will be liable to make good the loss sustained by a mortgage and surrender of the policy to the office.—*Kingdon* v. *Castleman*, W. N. 1877, p. 15. It is no less his duty to pay the premiums or to surrender the policy for the office price.—*Hill* v. *Trenery*, 23 Beav. 16. He will have a lien on the policy for premiums advanced by him.—*Todd* v. *Moorhouse*, L. R. 19 Eq. 69.

Notice of an assignment by the *cestui que trust* of his interest ought to be at once given to the trustee in order to obtain priority over any other assignment. Such notice by an assignee is equivalent to the possession of a chattel capable of actual delivery.—Griffith's Institutes of Equity.—*Morris* v. *Cannan*, 8 Jurist, N. S. 653; *M. Hansraj* v. *R. Joita*, 8 Bom. H. C. R., O. C. 177.

Property was assigned to trustees on trust for S for life, and after her death to such of her issue as she should appoint; the settlor and S had, during their joint lives and the survivor, also a power of appointing new trustees and a discretion in investing and the settlor had a power of revocation which he did not exercise. S by her will appointed the property to B and N for her son as trustees. After her death the settlor appointed L and N trustees of the settlement and the property was transferred to them. The son of S died, and B died, and had allowed the property to remain in the hands of N who made away with it. The persons beneficially entitled under the will of the son recovered judgment against the executor for the property made away with on the ground of wilful default. The executor brought an action against L on the ground that the property had been lost by his wilful default in allowing it to remain in the hands of N. Held, that S had power to appoint the property to trustees for her son that as he took the whole beneficial interest, the trustees of the settlement had no duties to perform except to hand over the property to the surviving trustees of the will and therefore that N was rightly in possession, and L was not liable for having allowed it to remain in his hands.—*Scotney* v. *Lomer*, 29 Ch. D. 535.

Where a trust was created by will for the payment of debts in the discretion of the executor, it was held that persons becoming creditors subsequent to the death might benefit thereby. A trust to pay will not revive a debt barred by a statute of limitations but on the other hand it will prevent the statute running.—*Bain* v. *Sadler*, L. R. 12 Eq. 570.

The rule as originally laid down by Lord REDESDALE, see Mitford's

Pleadings, pp. 184, 185 was that there must be either collusion with or insolvency of the personal representative pleaded and proved to entitle a creditor or legatee to sue for the recovery of assets. This rule was first relaxed where the personal representative of a deceased partner was sued with a surviving partner. Other special circumstances arising from the nature of the assets, or the position of the personal representative rendering it impossible, or at least seriously inconvenient for him to take proceedings, create a further relaxation. —*Hilliard* v. *Eiffe*, L. R. 7 E. & I. App. 39. Speaking generally what would entitle a creditor or legatee to sue would entitle them to sue in their own name.—*Yeatman* v. *Yeatman*, 7 Ch. D. 210.

Notwithstanding a different conclusion from preceding cases by Mr. Justice WILLIAMS—Williams on Executors, 6th edition, 1636—it is now settled law that upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor, so as to get execution against the assets of the testator. He may, however, not only realize the personal estate, but also pledge specific assets which is one mode of realizing them.—*Farhall* v. *Farhall*, 7 Ch. App. 123. In that case an executrix acting under a power had mortgaged to a bank part of her testator's real estate but had considerably overdrawn the executorship account. The Lords Justices refused to allow the bankers to prove for the overdraft.

A trustee or executor being in default to the assets directed to be employed in trade is disentitled to any indemnity thereout until he has made the default good. The creditors who are only entitled to stand in his place have no better title.—*In re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548. An executor carrying on the business of a testator in pursuance of the directions contained in the will, six years after the death surrendered a lease belonging to the testator and took a new one including other property at an additional rent in his own name. He afterwards deposited it as security for money advanced which he misappropriated to his own use. The mortgagee did not know that the mortgagor was an executor, and the renewed lease made no mention of the surrender. He did not however investigate the title. An action was afterwards brought to administer the testator's estate and a consent order was made for the sale of the lease-hold property without prejudice to any right, the mortgagee giving up the lease to facilitate the sale. The Court of appeal held that the lease was in equity part of the testator's estate and that the equity of the estate being prior to that of the mortgagee must prevail; though the judgment might have been altered if the lapse of time had been greater, if the directions of the will had not been pursued, or if circumstances justified the inference that the benefici-

aries had given the asset to the executor.—*In re Morgan, Pillgrem* v. *Pillgrem*, 18 Ch. D. 93.

The estate of a testator consisted in part of three second mortgage bonds of an American Railway Company for the nominal sum of 1,000 dollars each. A month after his death, the market price was £153 a bond. After this the price fell continuously, and sixteen months after the testator's death, the executors sold two of the bonds for £52 a piece. A suit to administer the estate was instituted by three out of the four residuary legatees, and when nearly three years after the death, it came on to a hearing, the third bond's price in the market was £10. One of the residuary legatees had pressed the executors to sell the bonds, the other three had assented or had not objected to the postponement of the sale. The Court held that the testator having thought fit to invest his money in very speculative bonds the beneficiaries being *sui juris*, the executors having acted honestly and not unreasonably, were not liable for the loss.—*Marsden* v. *Kent*, 5 Ch. D. 598.

A trustee who did not attain his majority until seventeen months after the death of the testator was held equally liable with his co-trustees for a loss which took place two years and a quarter after the testator's death.—*Sculthorpe* v. *Tipper*, L. R., 13 Eq. 232.

An absolute discretion given to executors to postpone the sale and conversion of the estate beyond the year is a justification for retaining shares in an unlimited liability company. Fraud alone would render them liable for non-conversion.—*In re Noorington*, 13 Ch. D. 654.

A bill was filed against four trustees in India of a fund in India and one formal defendant in England to recover money payable in England. The trustees out of the jurisdiction were served, appeared and answered, and entered into evidence :—Held, that as the defendants had voluntarily submitted to the jurisdiction, the Court might determine the question between the parties. By resolution of an association in the nature of a Benefit Society, certain pensions were to be given to the widows of the members and each member was to pay to the association a percentage on his income. Six months afterwards the operation of these resolutions was suspended :—Held, that the widow of a member who had not paid or tendered the requisite percentage had no claim to a pension under the resolutions : The funds of the association were vested in trustees :—Held, that neither they nor the association were trustees for the widow of any member so as to prevent the claim from being barred by lapse of time.—*Edwards* v. *Warden*, 9 Ch. App. 495.

16. Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character.

Conversion of perishable property.

Illustrations.

(*a*) A bequeaths to B all his property in trust for C during his life, and on his death for D, and on D's death for E. A's property consists of three leasehold houses, and there is nothing in A's will to show that he intended the houses to be enjoyed in specie. B should sell the houses, and invest the proceeds in accordance with section twenty.

(*b*) A bequeaths to B his three leasehold houses in Calcutta and all the furniture therein in trust for C during his life, and on his death for D, and on D's death for E. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and B should not sell them.

Commentary.

The general rule laid down by ELDON, L. C., in *Howe* v. *The Earl of Dartmouth*, 7 Vesey, 137, is the source of section 16. Of the numerous examples thereof to be found in the law reports, we select only those which exhibit a modification or illustration of its working in some practical detail. An express direction for sale at a particular period is an indication of an intention that there should be no previous sale or conversion.—*Gray* v. *Siggers*, 15 Ch. D. 74. A direction to sell so much and such part of the trust fund as the trustees in their "sole discretion" think fit will prevent the Court excluding the tenant for life from the larger income to be derived from the unsold property.—*In re Sewell's Estate*, L. R. 11 Eq. 80; *Miller* v. *Miller*, L. R. 13 Eq. 263. A power to sell real estate one to retain investments, to retain or sell indicates no intention that the tenant for life is to enjoy the income of the wasting property in specie.—*Jebb* v. *Tugwell*, 20 Beav. 84; *Porter* v. *Baddeley*, 5 Ch. D. 542; *Gray* v. *Siggers*, 15 Ch. D. 74; *Simpson* v. *Lester*, 4 Jur., N. S. 1769. But a direction to discharge incumbrances, one to renew or keep in repair, a power to demise leaseholds have each been grounds for giving the tenant for life the income of the leaseholds.—*Thursby* v. *Thursby*, L. R. 19 Eq. 395. An exception as of long annuities from a direction to convert shows an

intention that they are to be enjoyed in specie.—*Wilday* v. *Sandys*, L. R., 7 Eq. 455. Not so a general authority to allow money to remain in its then state of investment.—*Porter* v. *Baddeley*, 5 Ch. D. 542. An enumeration of particulars in a residuary bequest does not of itself make the bequest specific and exclude Lord ELDON'S rule.—*Tootal's Estate*, 2 Ch. D. 628. But the inclusion of a specific devise or bequest as of land is ground for an inference that the other particulars were specifically given.—*Booth* v. *Coulton*, 7 Jurist, N. S. 207; *Thursby* v. *Thursby*, L. R., 19 Eq. 396, which was the case of life tenancies in a colliery or mining business. Even the postponement of distribution until after the death of the tenant for life will not exclude the rule when the direction to postpone is not to give him the income but for the purposes of management.—*Macdonald* v. *Irvine*, 8 Ch. D. 101; *Brown* v. *Gellatly*, 2 Ch. App. 751, which was the case of a shipping business. But a direction to continue or sell an investment and meantime pay the profits arising from the securities to the tenant for life will give him the full income.—*In re Chancellor*, 24 Ch. D. 42.

The income which a tenant for life is entitled to out of reversionary property may be ascertained as follows:—The apportionment of the outstanding personal estate when it falls in between capital and income is to be by ascertaining the sum which put out at interest at £6 per centum on the day of the death of the testator would at compound interest year by year accumulate to the sum actually received on the falling in. Such sum is to be considered as capital all else as income.—*Chesterfield's Trusts*, 24 Ch. D. 643. Losses in carrying on a business are not to be paid out of capital but out of subsequent profits.—*Upton* v. *Brown*, 12 Ch. D. 872.

Where executors or trustees do not convert property within a year, they are liable to the burthen of proving that the delay has not been prejudicial to the beneficiaries.—*Cuff* v. *Hall*, 1 Jurist, N. S. 972; *De la Salle* v. *Moorat*, L. R. 11 Eq. 8.

Executors and administrators who neglect to convert for the purpose of providing for payment of debts or of interest on those which carry interest should the unconverted funds be lost will be guilty of a *devastavit* and liable themselves to pay both interest and debts if sued within the period allowed by the statute of limitations.—*In re Baker*, 20 Ch. D. 230; unless they have been induced to the *devastavit* by misrepresentations of the creditor.—*Jewsbury* v. *Mummery*, L. R., 8 C. P. 56; *Roe* v. *Birch*, 27 Ch. D. 622. A loan upon personal security such as a promissory note unless expressly authorised by the settlor or testator will be a breach of trust.—*Pickard* v. *Anderson*, L. R., 13 Eq. 608. A general discretion is not sufficient neither is a power to invest on such good security as the trustees can procure

and may think fit, nor a power to invest in any securities whatever.—*Potts* v. *Britton*, L. R. 11 Eq. 433; *Bethell* v. *Abraham*, L. R. 17 Eq. 24; *Lewis* v. *Nobbs*, 8 Ch. D. 591.

Trustee to be impartial.

17. Where there are more beneficiaries than one the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion.

Illustration.

A, a trustee for B, C and D, is empowered to choose between several specified modes of investing the trust-property. A in good faith chooses one of these modes. The Court will not interfere, although the result of the choice may be to vary the relative rights of B, C and D.

Commentary.

The exercise of the impartiality is limited by the trusts. Trustees do wrong when they use the power of their position or any other power which they possess to induce one beneficiary to surrender to another any portion of his property.—*Ellis* v. *Barker*, 7 Ch. Ap. 104.

In the absence of special circumstances making an increase of income beneficial to those in remainder irrespective of pecuniary calculations, the Court does not authorise a transfer from its most approved securities to a species producing a larger income which though it may benefit the tenant for life may also injure pecuniarily those in remainder.—*In re Boyce's Minors*, 1 Ir. Rep. Eq. 45. The exigencies however of families may render it desirable to increase the income of the parents for the sake of the children and a statement to that effect in the petition will have, if proved, much weight with the Judge.—*Cockburn* v. *Peel*, 3 DeG. & J. 174; *Vidler* v. *Parrot*, 12 W. R. 976. Another fact likely to obtain a favourable answer to such petition is that the petitioner was the settlor and the opposing reversioners volunteers.—*Cohen* v. *Waley*, 7 Jurist, N. S. 937. Another that there is no probability of issue and that the persons entitled absolutely in remainder consent. In this case an investment in East India stock was ordered.—*Montefiore* v. *Guedalla*, W. N., A.D. 1868, p. 87. Another that the object of the trusts is to produce a certain income for the tenant for life by way of annuity.—*Mortimer* v. *Picton*, 10 Jur. N. S. 83.

Fairness to the tenant for life requires that the sale or change should be made soon after the receipt of dividends for the tenant for life, seeing that the Court will not, unless the circumstances are very special, order an apportionment to recoup the immediate loss of income.—*Bulkeley* v. *Stephens*, 3 N. R. 105; *Freeman* v. *Whitbread*, L. R., 1 Eq. 266. An alternative power to invest on Government securities or on mortgage of realty does not, without more, authorise a sale of stock and the investing the proceeds on a mortgage for securing a retransfer of the stock.—*Whitney* v. *Smith*, 4 Ch. Ap. 513.

Trustee to prevent waste.

18. Where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

Commentary.

A tenant for life commits waste when he cuts down timber trees except for the purpose of husbandry which belong to the inheritance or destroys ornamental plantations which improve the value of a family mansion.—*Garth* v. *Cotton*, 1 Vesey Sen. 524; 1 Dick. 583. He also commits waste when he digs pits for gravel, lime, clay, brick, earth, stone or other minerals (except for repairs) or opens mines for metal, coal, gold, or the like which were not open when his estate began.—Coke on Littleton, 53*b*; *Viner* v. *Vaughan*, 2 Beav. 466. It is not waste if he continue the working of pits and mines previously opened unless the previous working was a mere preparation and was abandoned or for a defined and restricted purpose.—*Elias* v. *Snowden Slate Quarries Company*, 4 App. Cas. 465: S. C., with the title *Elias* v. *Griffith*, 8 Ch. D. 521. To justify a termor in working mines, he must show that the reversioner had begun the working with a view to profit. The same is the rule for quarries.—*Elias* v. *Griffith*, 8 Ch. D. 521.

The usual clause in a settlement giving the tenant for life an estate "without impeachment of waste" at first was strictly interpreted and merely protected him from the statutory penalty without giving him the property in the timber or minerals or other articles obtained by the waste. Afterwards the said clause was held to give the property therein to the tenant.—*Lewis Bowles's case*, 11 Rep. 79*b* But equity interfered and protected ornamental plantations. Should there be no trustee, or should he refuse to act a person entitled in

remainder, a mortgagee or a married woman might obtain the protection of the Court against the tenant for life the mortgagor or husband respectively.

"At common law the executor or administrator is treated for many purposes as the owner of the assets and has a power to dispose of and alien them. There is no such thing known as the assets in the hands of an executor being the debtor, or as the creditors having a lien on them, but the person of the executor in respect of the assets which he has in his hands is treated as the debtor. At law the assets of the testator may perhaps at least under special circumstances be taken in execution for the personal debt of the executor unless indeed there be some fraud or collusion between the execution-creditor and the executor as they certainly also may be taken in execution for the debts of the testator. But in Courts of Equity the assets are treated as the debtor, or in other words a trust fund is formed to be administered by the executor for the benefit of all persons who are interested in it whether they are creditors or legatees, or distributees, or otherwise interested according to their respective priorities, rights and privileges.—1 Story's Commentaries, 12th edition, section 579. "Every person," said Sir JOHN LEACH, "who acquires personal assets by a breach of trust or waste by the executor, is responsible to those who are entitled under the will if he is a party to the breach of trust."—*Keane* v. *Robarts*, 4 Mad. Rep. 357.

Where one of several residuary legatees, or next-of-kin has received his share of the estate of a testator, he is liable to refund if waste was committed before a transfer of the full amount due to him, but not when waste was committed subsequently. The burden of proving the time and the waste is upon those who seek to compel a repayment.—*Peterson* v. *Peterson*, L. R. 3 Eq. 111.

The Hindu widow or female heir is for all purposes of enjoyment full and complete owner. She has a full right to cut timber, it is thought, open mines and the like, provided she does so for the purpose of enjoying the estate and not injuring the reversion. She is in the position of an heir taking by descent until a contingency happens, not of an heir or devisee upon implied trust. Therefore a bill filed by the presumptive heir in succession against her must show not a breach of trust but actual spoliation.—*Hurry Doss Dutt* v. *S. M. Uppoornah Dossee*, 6 M. I. A. 446; *Grose* v. *Amirtamayi Dassi*, 4 B. L. R, O. C. 1. A widow who is removed from the management of her property by the appointment of a receiver is still entitled to the rents and profits. The Court will not decree her maintenance and hold the surplus in trust for the reversioners.—*Shama Soondaree* v. *Jumoona Chowdhrain*, 24 W. R. 86. The contingent reversioners

may sue where there is collusion between the widow and the immediate reversioners, or where otherwise necessary.—*Chottoo Misser* v. *Jemah Misser*, I. L. R. 6 Cal., 198; *Kooer Goolab Singh* v. *Rao Kurum Singh*, 14 M. I. A. 176.

The statute of waste between joint tenants and tenants in common, 13 Edw. I, c. 22 applies to India.

Accounts and information.

19. A trustee is bound (*a*) to keep clear and accurate accounts of the trust-property, and (*b*), at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

Commentary.

If the plaintiff pray for an account with interest and at the hearing the ordinary decree is made, and in the course of taking the accounts improper balances appear, interest thereon may be asked for at the hearing or further directions.—*In re Delevante*, 6 Jurist, N. S. 118.

Notice of a contingent liability such as that trustees hold shares for the testator as beneficiary in a company which might be wound up, and in respect of which the trustees (whom the testator was bound to indemnify) might be liable as contributories is not necessarily a reason why an executor should not distribute the assets. In such a case he is entitled to be indemnified out of the estate already distributed if he pays.—*Jervis* v. *Wolferstan*, L. R., 18 Eq. 18.

Bengal father of a joint Hindu family is not liable to account as karta, Mitakshara father is liable.—Tagore Lecture, 1884-5, pp. 234, 235.

Should a trustee mix his accounts with those of his own trading concerns, he will have to produce the original books of account. *Horton* v. *Brocklehurst*, 29 Beav. 504 shows that a co-trustee who adopts and sanctions improper accounts becomes responsible for the conduct of his fellow. After a settlement of all the trust matters, the trustees are entitled to the possession of the vouchers; the beneficiaries will have a right not only to inspect them but to take copies at their own expense.—*Pearse* v. *Green*, 1 J. & W. 140. The Court when taking accounts against a trustee considers his integrity and good faith. The staleness of any transaction and item, the knowledge of the beneficiary thereof and his acquiescence therein

are things not without weight in their influence upon the judgment. —*McDonnell* v. *White*, 11 H. L. Cas. 570; *Payne* v. *Evens*, L. R., 18 Eq. 356.

Investment of trust-money.

20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others :—

(*a*) in promissory notes, debentures, stock or other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland;

(*b*) in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India;

(*c*) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council.

(*d*) in debentures or other securities for money issued by, or on behalf of, any municipal body under the authority of any Act of a legislature established in British India;

(*e*) on a first mortgage of immoveable property situate in British India: provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money; or

(*f*) on any other security expressly authorized by the instrument of trust, or by any rule which the High Court may from time to time prescribe in this behalf.

Provided that, where there is a person competent to contract and entitled in possession to receive the

income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*) shall be made without his consent in writing.

Commentary.

A testator directed that a trustee should invest his money in such mode or modes of investment as they in their uncontrolled discretion should think fit. They invested part in bonds of a foreign Government, in bonds of a colonial railway, and in shares of a bank on which there was a further liability. The Court held that though the investments ought not to be retained by the trustees, yet as they had acted *bonâ fide* and no loss had resulted to the trust estate, they ought not to be disallowed the sums which they had laid out in making the investments.—*In re Brown*, 29 Ch. D. 889.

The trustees of real and personal estate decreed and bequeathed in trust for A for life with remainder to his children who were infants were authorized, there being no investment clause in the will to advance a portion of the personalty to A to enable him to stock a farm part of the realty on the ground that such a proceeding would benefit the infants entitled in remainder.—*In re Household*, L. R. 27 Ch. D. 553.

Trustees should not lend money on mortgage of property until its value has been estimated by competent and disinterested surveyors, and its title investigated by their legal advisers. The steward or land agent of the mortgagor is not a disinterested person within this rule.—*Budge* v. *Gummow*, 7 Ch. App. 719; *Bell* v. *Turner* W. N., A.D. 1874, p. 113. They ought to exercise their own judgment in the choice of the valuer or surveyor.—*Fry* v. *Tapson*, 28 Ch. D. 268, also in the choice of their legal adviser as the consequences of his ignorance or negligence may fall upon them.—*Sutton* v. *Wilders*, L. R. 12 Eq. 373; *Midland Railway Company* v. *Taylor*, 8 H. L. C. 751.

In England at present, the tendency is not to make the two-third rule the test of a trustee's liability, but rather the degree of prudence exhibited by them which must be such as prudent men would have displayed in the management of their own affairs.—*In re Godfrey*, 23 Ch. D. 483.

It is doubtful whether it is not a breach of trust to lend money upon a second mortgage unless the trustee obtain the legal estate: there is no doubt that in such a case it behoves the trustee to look most strictly into the question of value.—*Waring* v. *Waring*, 3 Ir. Ch. 331. A power of sale being a modern improvement introduced into

mortgage-deeds it has been held no breach of trust to lend on a mortgage without it. But it is the duty of a trustee to do the best they can for the trust estate.—*Farrar* v. *Barraclough*, 2 Sm. & Gif. 231. And certainly they ought not to lend it on a deed which precludes its being called in for a considerable period.—*Vickery* v. *Evans*, 33 Beav. 376; *Mant* v. *Leith*, 15 Beav. 524. A power of investing on "the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments" does not authorise an investment in railway debentures.—*Mortimore* v. *Mortimore*, 4 DeG. & J. 472. The ordinary power of investing upon real securities would not include an estate for life.—*Lander* v. *Weston*, 3 Drew, 389, unless in the case of leases for lives renewable for ever as in Ireland.—*Macleod* v. *Annesley*, 16 Beav. 600; nor a judgment upon lands.—*Johnston* v. *Lloyd*, 7 Ir. Eq. 252. Long terms of years hardly fall within the description of real securities.—*Boyd's Settled Estates*, 14 Ch. D. 626; *in re Spurn Lights*, 14 Ch. D. 627. Every onerous covenant lessens the value of such a security.—*In re Chennell*, 8 Ch. D. 492. "Freehold or copyhold hereditaments" include freehold ground rents whether the power refer to loan or purchase.—*Vickery* v. *Evans*, 12 W. R. 237; *Reyton's Settlement*, L. R. 7 Eq. 463. "Foreign funds" do not include bonds or debentures of municipal towns and railways, 10 L. R. Eq. 39. "Any other foreign Government" has been held to include particular states of the United States of America.—*Caddett* v. *Everarle*, 5 Ch. D. 710. A discretion to invest in foreign bonds or other special discretion, vested in particular trustees known to the settlor though in terms given to their successors is not a power annexed to the trust. The successors merely perform those duties which are necessary for carrying into effect the uses and the benefits given unless the discretion is otherwise confirmed to them.—*Zambaco* v. *Cassavetti*, L. R. 10 Eq. 439. Foreign bonds though guaranteed by the British Government are not included in the word "funds."—*Burnie* v. *Getting*, 2 Coll. 324. On the other hand the costs of the transaction in "ninety-nine cases out of a hundred" is a strong reason for not transferring an investment in the funds to one upon mortgage.—*Ex parte Franklyn*, 1 DeG. & Sm. 528.—*Barry* v. *Marriott*, 2 DeG. & Sm. 491.

An executor may be justified in making further advances to secure his testator's mortgage, but he should retain evidence that he carefully investigated the probabilities of success before doing so.—*Collinson* v. *Lister*, 20 Beav. 356. Executors who keep money in their hands after a year from the death of their testator may be called upon to prove that in so doing, they are not guilty of negligence and a breach of trust. Should it appear that they have made interest on the assets, they will not be allowed to retain it, should

they have neglected so to do, they will be charged for the same in England at the rate of £4 per centum per annum, and in some cases with annual rests that is with compound interest. When by their misconduct money is lost which they never received, the rule is to make them pay the principal but not interest.—*In Attorney-General* v. *Kohler*, 8 Jurist, N. S. 467.

The responsibility created by an unauthorised investment extends to any future loss caused thereby.—*Fyler* v. *Fyler*, 3 Beav. 550, but does not necessarily entail liability for interest upon the loss.—*Vyse* v. *Foster*, 8 Ch. App. 309; 7 H. L. C. 318. In that case there was a mixed fund of realty and personalty part of which the trustees acting in good faith, but without authority spent in improving the realty settlement trustees were empowered to invest in the bonds, debentures, or other securities or the stocks or funds of any colony or foreign country. The payment of bonds of a foreign Railway Company French Companie des chemins de fer du midi within 50 years was secured by a sinking fund guaranteed by the Government with interest meanwhile.—JAMES, V.C. held that they were not securities of a foreign country.—*Langdale's Settlement*, L. R. 10 Eq. 41.

While a trust estate is being administered by the Court, a power of a trustee to make a purchase or mortgage though its terms admit of no dispute is only exercisable in subordination to the judgment of the Court by whom a reference is directed to ascertain the propriety of the investment in all respects.—*Bethell* v. *Abraham*, L. R. 17 Eq. 27.

Trustees of a marriage settlement were authorised with the consent of the husband and wife to invest the funds upon such security as they should think proper "either personal or real." At the date of the marriage, part of the funds were outstanding on the husband's note of hand, the Court allowed the investment to continue upon a bond under hand and seal being substituted for the note of hand.—*Pickard* v. *Anderson*, L. R. 13 Eq. 608.

Mortgage of land pledged to Government under Act XXVI of 1871.

Deposit in Government Savings Bank.

21. Nothing in section twenty shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immoveable property already pledged as security for an advance under the Land Improvement Act, 1871, or in case the trust-money does not exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

Commentary.

The Land Improvements Loan Act, 1883, was made to extend to the whole of British India, but was not to come into force in any part of British India until such date as the local Government, with the previous sanction of the Governor-General in Council might, by notification in the local *Official Gazette*, appoint in that behalf. The Land Improvement Act, 1871, and Act XXI of 1876 (an amending Act) are except as regards the recovery of advances made before the Act of 1883 came into force and costs incurred by the Government in respect of such advances repealed by Act XIX of 1883, sections 1 and 2.

Sale by trustee directed to sell within specified time.

22. Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.

Illustration.

A bequeaths property to B, directing him with all convenient speed and within five years to sell it, and apply the proceeds for the benefit of C. In the exercise of reasonable discretion, B postpones the sale for six years. The sale is not thereby rendered invalid, but C, alleging that he has been injured by the postponement, institutes a suit against B to obtain compensation. In such suit the burden of proving that C has not been injured lies on B.

Commentary.

A trustee held shares in a company on trust for an adult *cestui que trust*. He had applied for them at the request of the *cestui que trust* who paid the money due to the company on the application and allotment. The trustee executed a transfer of the shares to the *cestui que trust*, and the latter sent it to the company for registration, but the director refused to register it, and when an order was made to wind up the company, the trustee's name remained on the register as the holder of the shares. No further call had been made on them. The trustee brought an action against the *cestui que trust* claiming an indemnity against liability on the shares. There was no evidence to show whether calls were likely to be made in the winding up:—Held that the action was a mere *quia timet* one and that it was premature and could not be maintained.—*Ranelaugh* v. *Hayes*,

1 Vernon, 189 not followed.—*Hughes Hallett* v. *Indian Mammoth Gold Mines Company*, 22 Ch. D. 561.

Real property was vested in trustees upon trust at the request of A and B and the survivor, and after their death, at discretion to sell and hold the proceeds upon trust for A and B successively and then for the children equally. After the deaths of A and B, there were three children who attained their majority. It was held that the trust for sale was not spent, but was exerciseable without the consent of the beneficiaries who nevertheless might have united and required a conveyance of the realty to themselves.—*In re Tweedie*, 27 Ch. D. 315.

Where a *cestui que trust* who is party to a breach of trust is a married woman, and the trustees claim a right of retainer against her life interest in settled funds to indemnify them against the breach of trust, they are bound to show that she acted for herself and was fully informed of the state of the case.—*Sawyer* v. *Sawyer*, 28 Ch. D. 595.

Liability for breach of trust.

23. Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases:—

(*a*) where he has actually received interest:

(*b*) where the breach consists in unreasonable delay in paying trust-money to the beneficiary:

(*c*) where the trustee ought to have received interest, but has not done so:

(*d*) where he may be fairly presumed to have received interest.

He is liable, in case (*a*), to account for the interest actually received, and, in cases (*b*), (*c*) and (*d*), to account for simple interest at the rate of six per cent. per annum, unless the Court otherwise directs,

(*e*) where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate.

(*f*) Where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment.

Illustrations.

(*a*) A trustee improperly leaves trust-property outstanding, and it is consequently lost: he is liable to make good the property lost, but he is not liable to pay interest thereon.

(*b*) A bequeaths a house to B in trust to sell it and pay the proceeds to C. B neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. B is answerable to C for the loss.

(*c*) A trustee is guilty of unreasonable delay in investing trust-money in accordance with section twenty, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(*d*) The duty of the trustee is to invest trust-money in any of the securities mentioned in section twenty, clause (*a*), (*b*), (*c*) or (*d*). Instead of so doing, he retains the money in his hands. He is liable at the option of the beneficiary, to be charged either with the amount of the principal money and interest or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon.

(*e*) The instrument of trust directs the trustee to invest trust-money either in any of such securities or on mortgage of immoveable property. The trustee does neither. He is liable for the principal money and interest.

(*f*) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable at the option of the beneficiary to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(*g*) Trust property is invested in one of the securities mentioned in section twenty, clause (*a*), (*b*), (*c*) or (*d*). The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(*h*) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.

Commentary.

If a person having a right and seeing another person about to commit, or in the course of committing an act infringing on that right stands by in such a manner as really to induce the person committing the act, and who otherwise might have abstained from it to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.—*De Bussche* v. *Alt.*, 8 Ch. D. 314.

A reversioner not suing until his interest has vested in possession, is not easily fixed with acquiescence (*Taylor* v. *Cartwright*, L. R. 14 Eq. 167), but may be barred by knowledge presumed from great lapse of time, for instance, twenty years—*Thomson* v. *Eastwood*, 2 App. Cas. 236. The release of a transaction null and void will not bar.—*Thomson* v. *Eastwood*.

If a trustee in good faith pays over trust money to a person not entitled, he may be ordered to refund but not to pay interest. When through mistake interest has been paid, it cannot be recovered.—*Ex parte Ogle*, 8 Ch. 711. Executors ought to make a fund productive and should apply the assets in paying any debt that carries interest. They will be liable for their neglect and chargeable with the interest.—*Turner* v. *Turner*, 1 J. & W. 43; *Burdick* v. *Garrick*, 5 Ch. 233.

Acquiescence is quiescence under such circumstances that assent to the act may be presumed. It is an instance of the general rule that a person may be estopped by his words or conduct from impugning a transaction. Should the breach of trust have been made without the knowledge of the beneficiary there can be no estoppel, a right of action accrues to be released only by accord and satisfaction or positive release.—*De Bussche* v. *Alt.*, 8 Ch. D. 314. Length of time though not amounting to an actual bar is strong evidence of acquiescence.—*Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 72. That a beneficiary may release he must be competent to contract.—*Wilkinson* v. *Parry*, 4 Russ. 276. A transaction entirely null and void cannot be released.—*Thomson* v. *Eastwood*, 2 App. Cas. 215.

No set-off allowed to trustee.

24. A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

Non-liability for predecessor's default.

25. Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

Commentary.

In the absence of contract limiting the liability of a trustee to that which he personally receives, execution may be issued against any separate trustee for the whole loss where all the trustees are to blame.—*Ex parte Norris*, 4 Ch. App. 280. Similarly a proof in bankruptcy may be made against the estate of each trustee unless they constitute a firm and an election has been made to prove against the firm.—*In re J. and H. Davison*, W. N., 1884, April 26.

Contribution or apportionment may in a beneficiary's suit be ordered in a proper case between the trustees, or in another action framed for the purpose and the trustee most to blame, be made primarily liable.—*Featherston* v. *West*, 6 Ir. Rep. Eq. 86.

A defaulting trustee indebted to the estate cannot claim any portion thereof though entitled thereto derivatively as next of kin of one of the *cestuis que trust*.—*Jacubs* v. *Rylance*, L. R. 17 Eq. 341. The rule to be found in Justinian's Digest is even more comprehensive "Posteaquam placuit inter omnes id quod invicem debetur ipso jure compensari.—Digest *b* 16, *t.* 2, *l.* 21.

Directors of a company are in effect managing trustees. (1) If they

make to the share-holders misrepresentations that profits have been earned, and so induce the passing of resolutions by the general meeting declaring dividends, they will in winding up proceedings be made to replace all paid out of capital. (2) Such payments being *ultra vires* cannot be ratified so as to prevent their recovery for proper purposes. (3) The Statute of Limitations is no good plea to the recovery. (4) The directors cannot set off money due to them from the company against dividends ordered to be replaced by them.—*Exchange Banking Company Flitcroft's case*, 21 Ch. D. 519; *ex parte Pelly*, 21 Ch. D. 492.

A retainer against a beneficiary party to a breach of trust in favour of the trust estate prevails not only against him, but also against all claiming under him whether general creditors or assignees in bankruptcy.—*Jacubs* v. *Rylance*, L. R. 17 Eq. 341. It is however, stopped by a purchase for value without notice.—*Basset* v. *Nosworthy*, 2 L. C. 1. Instigation by a beneficiary of the trustees to commit a breach not followed by any benefit to the beneficiary does not render him liable to recoup them.—*Butler* v. *Butler*, 7 Ch. D. 116.

The debt created by a breach of trust may be proved at once in bankruptcy deducting therefrom the beneficial interest therein of the trustee.—*E. P. Bishop*, 8 Ch. App. 718. When a bankrupt trustee neglects to prove for the trust dividends, his certificate of discharge will not free him from making them good.—*Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 512. When a proof in bankruptcy produces less than is due to the tenant for life and the remainderman, interest at a certain rate per cent. is calculated thereon, deducted and paid to the tenant for life as income and the rest is treated as capital.—*In re Tinkler's Estate*, L. R. 20 Eq. 456.

A settlement made with the sanction of the Court on the marriage of an infant of certain funds which are alleged to be the infant's share under a will, does not operate as a confirmation of prior dealings by the trustees of the will so as to preclude the *cestuis que trust* under the settlement from instituting proceedings charging the trustees under the will with breach of trust.—Romilly, M. R.; *Zambaco* v. *Cassavetti*, L. R. 11 Eq. Ca. 439.

Where an improper investment has been made, legal proceedings may be taken to compel the trustees to recoup the loss incurred by reason of their breach of trust.—*Hardly* v. *Metropolitan and Finance Company*, 7 Ch. App. 427. The Court will not allow a trustee to set off a gain by one unauthorized investment against a loss from another. Lord ST. LEONARDS endeavoured to induce the legislature to change this rule, but he was unsuccessful.

A remainderman is unable to take legal proceedings alleging wilful default in respect of a prior life estate seeing that his interest is confined to the corpus.—*Whitney* v. *Smith*, 4 Ch. App. 513.

A trustee who accepts office at the request of the beneficiary is entitled to be indemnified by him personally against all loss which may accrue in the proper execution of the trust. Trustees and executors are entitled to be indemnified after the death of the beneficiary out of his estate and therefore can call upon residuary and other legatees to refund what has been paid them.—*Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

A debtor to a testator's estate wishing to have the receipt of two executors, the executor who received the money forged the signature of his fellow-executor, and also signed himself the receipt, was held to be a valid discharge.—*Charlton* v. *Earl of Durham*, 4 Ch. App. 433.

A statute of limitations cannot be pleaded by trustees who have committed a breach of trust on their representatives.—*Story* v. *Gape*, 2 Jur. N. S. 706; *Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514; *In re Cross*, 20 Ch. D. 109, or solicitors taking money with notice of an express trust binding it.—*Burdick* v. *Garrick*, 5 Ch. App. 240; but it may by a solicitor receiving money in the character of an agent. —*Watson* v. *Woodman*, L. R. 20 Eq. 721. Nor can it be pleaded by a settlor who covenants to settle a sum of money and constitutes himself a trustee: if he do not so constitute himself he may plead but trustees who have neglected to enforce the covenant and their representatives will be unable to do so.—*Burrowes* v. *Gore*, 6 H. L. C. 907; *Stone* v. *Stone*, 5 Ch. Ap. 74; *Woodhouse* v. *Woodhouse*, L. R. 8. Eq. 514. While the receipt of a bribe or the fraudulent making of a profit by a person in a fiduciary position continues concealed, no length of time bars the wronged beneficiary. But immediately after discovery, the period of limitation commences.— Griffith's Institutes of Equity, p. ; *South Sea Company* v. *Wymondsell*, 3 P. Wms. 143; *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319.

Should both or more trustees be cognisant of a breach of trust, a primary liability will not in the absence of the *cestui que trust* be attributed to one trustee because he received a greater profit from the breach than the other or others anticipated.—*Butler* v. *Butler*, 7 Ch. D. 116.

A *cestui que trust* though he combines the character of trustees, may take proceedings against a tenant for life who has obtained possession of the trust-property through the negligence of the *cestui que trust* when acting as trustee. Thus, A.D. 1821, a marriage settlement

was executed which assigned stock belonging to the wife to B and another on trust for the wife for life, then for the husband, then in default of children for B. The trustees neglected to apply to the Bank to transfer the stock out of the name of the wife into their own names. The husband sold it and appropriated the proceeds. This was done A.D. 1822. B died in 1829, the husband in 1858, the wife in 1864. In 1866 B's executors claimed the fund from the husband's executors. Neither the statute of limitations, nor acquiescence, nor the fact that B was trustee was held to bar the claim.—*Butler* v. *Carter*, L. R. 5 Eq. 276.

The statute of limitations does not, the statute of frauds does prevent an executor or administrator of a deceased's assets paying or retaining in his own interest a debt which if all parties were living would be bound by the statutes.—*Sharman* v. *Rudd*, 4 Jur., N. S. 427; *in re Rownson*, 29 Ch. D. 358.

26. Subject to the provisions of sections thirteen and fifteen, one trustee is not, as such, liable for a breach of trust committed by his co-trustee :

Non-liability for co-trustee's default.

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

(*a*) where he has delivered trust-property to his co-trustee without seeing to its proper application :

(*b*) where he allows his co-trustee to receive trust-property and fails to make due inquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require :

(*c*) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only,

Joining in receipt for conformity.

for loss or misapplication of the property by his co-trustee.

Illustration.

A bequeaths certain property to B and C, and directs them to sell it and invest the proceeds for the benefit of D. B and C accordingly sell the property, and the purchase-money is received by B and retained in his hands. C pays no attention to the matter for two years and then calls on B to make the investment. B is unable to do so, becomes insolvent, and the purchase-money is lost. C may be compelled to make good the amount.

Commentary.

The general question, how far a person is liable for the acts and receipts of a co-trustee is decided by Lord KEEPER COVENTRY and other Judges in *Townley* v. *Sherborne*, 2 L. C. 870, thus: If there be two executors and one of them waste all or any part of the estate, the *devastavit* shall charge him only and not his co-executor. And it is no breach of trust to permit one of the trustees to receive all, or the most part of the profits, it falling out many times that some of the trustees live far from the lands and are put in trust out of other respects than to be troubled with the receipt of the profits. But his Lordship said, and the said Judges were of opinion, that if there be two trustees were, and one of them without warrant of the party that trusteth him or of a Court of Equity assigneth the estate and the assignee doth receive the profits and becometh non-solvent, he that made the assignment shall answer it for him, but the other original trustee shall answer for no more than what he receiveth himself, because the assign cometh not in by him or his assent or appointment. And that in case of the original trustee, that did not make the assignment receive the whole profits and become non-solvent, neither the assignor nor the assignee shall be answerable for them.

And if an obligation be made to two in trust, and one of them release the whole debt, as by law he may this shall not charge his companion for any part. But it was also resolved that if upon the proofs or circumstances the Court be satisfied that there be *dolus malus* or any evil practice, fraud or ill intent in him that permitted his companions to receive the whole profits, he may be charged though he received nothing.

"Evil practice, fraud or ill intent" includes at the present day such neglect of duty as amounts to a breach thereof. The Lord Chancellor thus analysed the distinction between a joint receipt by trustees and by executors: "At law where trustees join in a receipt *primâ facie* all are to be considered as having received the money. But it is com-

petent to a trustee and if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all was in fact received by one and the other joined only for conformity. In the case of executors it has been said and well said to be otherwise. An executor as it is not necessary for him to join interfering in the transaction unnecessarily the inference is just the other way he is to be considered as assuming a power over the fund and therefore answerable for the application as far as it is connected with the particular transaction in which he joins.—*Brice* v. *Stokes*, 11 Vesey, 319.

The Indian Limitation Act, 1877, Act XV, section 21, orders that nothing in sections 19 and 20 shall render one of several joint executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by or by the agent of any other or others of them.

Each of two trustees retained possession of a moiety of bonds passing by delivery which were held in trust. One of them disposed of the moiety held by him and misapplied the proceeds to his own use. The other trustee was ordered to make good the loss.—*Lewis* v. *Nobbs*, 8 Ch. D. 591.

The words "such signature only" require to be emphasised. They do not justify a trustee in delegating his discretion as to the investment to be chosen or relieve him from a prudent care as to the application of the money.—*Townley* v. *Sherborne*, 2 L. C. 870; *Walker* v. *Symonds*, 3 Swans. 1.

Several liability of co-trustees.

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Contribution as between co-trustees.

But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss; and if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to autho-

rize a trustee who has been guilty of fraud to institute a suit to compel contribution.

Commentary.

A *cestui que trust* suffering from a breach committed by several trustees has a remedy against one or all, unless he authorized or approved of the breach of trust.—*Ex parte Norris*, 4 Ch. App. 280.

A trustee may be liable to the beneficiary on the broad general principle that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."—2 Term Reports, 70. As between the trustees, other principles may come into force, such as "Where the right is equal, the claim of the party in actual possession shall prevail."—Plowden, 296. This maxim is of general application to titles, to land commercial paper and other personalty. Its correlative maxim in respect of legal remedies is where parties are equally to blame, or equally in the wrong, the claim of the party actually in possession shall prevail—*Atkinson* v. *Denby*, 6 H. & N. 778; 7 H. & N. 934. On the comprehensive principle thereof is based the sweeping common law rule, that an action for contribution cannot be maintained by one of several joint wrong-doers against another although the one who claims contribution may have been compelled to pay the entire damages recovered as compensation for the tortious act.—*Campbell* v. *Campbell*, 7 Cl. & Fin. 166. Equity, however, readily admits exceptions to the rule where public policy requires them and like the framers of the Indian Trust Act pays great attention to the equality of the trespass or other negligence.—*Reynell* v. *Sprye*, 1 DeG. M. & G. 660. And if one trustee pay the whole of what is due to the beneficiary, from all of them, he will in a proper case have a lien on any legacy due to a co-trustee in the same suit by way of contribution.—*Prime* v. *Savell*, W. N. 1867, p. 227. But where the guilt of fraud attaches to the trustees, contribution or apportionment will not be ordered by the Court.—*Tarlton* v. *Hornby*, 1 Y. & C. Ex. Ca. 336; *A. G.* v. *Wilson*, 1 C. & Ph. 28; *Lingard* v. *Bromley*, 1 V. & B. 114. A trustee who had misappropriated a fund, sold out stock of another fund of which he was also trustee and applied the stock proceeds in purchase of other stock to take the place of the fund first misappropriated. An action was then commenced by the defaulter's co-trustee of the one fund against the co-trustee of the other fund to decide on which of the two innocent parties the loss must fall. COTTON, BOWEN and FAY, L. JJ., held that the then holder of the stock was in the position of a purchaser for value without notice and therefore entitled to retain the advantage. Had the trust fund been a chose in action assignable only in equity and not at law,

the decision would have been reversed. For the assignee of such a chose in action takes subject to all other equities affecting the chose.—*Taylor* v. *Blakelock*, 53 L. T. Rep., N. S. 753 and 55 L. T. Rep., N. S. 8.

Non-liability of trustee paying without notice of transfer by beneficiary.

28. When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

Liability of trustee where beneficiary's interest is forfeited to Government.

29. When the beneficiary's interest is forfeited or awarded by legal adjudication to Government, the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as the Government may direct in this behalf.

Indemnity of trustees.

30. Subject to the provisions of the instrument of trust and of sections twenty-three and twenty-six, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive, and shall not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

Commentary.

The Trustees and Mortgagees Powers Act XXVIII of 1866, section 37 provides that instruments of trust shall be deemed to contain a clause embracing the object of this and the thirty-second sections of the present Act.

CHAPTER IV.

OF THE RIGHTS AND POWERS OF TRUSTEES.

The word 'right,' like *jus* in Latin, *droit* in French, and *recht* in German, is used in two senses; (1) the objective, (2) the subjective.

In its objective sense it is equivalent to those laws or rules which men as living creatures endued with reason and conscience are bound to observe mutually as directors of their free actions. When viewed with respect to the coercive power of the Magistrate, these rules form the Municipal law ceasing to be merely moral precepts. Such is the true meaning of the maxim *jus est norma agendi*, (2) Right in its subjective sense is the power of acting the moral faculty of doing or requiring others to do or abstain from doing.—*Macheldey*, § 2. Both rights and powers form portions of the general law. And the rights and powers of trustees might be described as certain portions of the general law belonging to them and not to others.—Griffith's Institutes of Equity, p. 82.

Right to title-deeds.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property.

Commentary.

This section is but one rule amongst several relating to the possession of title-deeds. The most general rule is that the person who for the time being is entitled to the property for an estate at law and in possession not less than free-hold has a right to their custody. Unless he be a trustee, he will not be bound to produce them. Should the life estate be preceded by a term of years, the tenant for life will be treated as a trustee for the termor, as he may also be for a remainderman. A mortgagee in fee is entitled to the deeds, and not to inquire after them will fix him with negligence. Though a mortgagor cannot compel a mortgagee to produce the deeds a person with a paramount claim to both may. A lease and derivative documents belong to the termor or lessee. When property is alienated in separate portions, the owner of one can compel the owner of another portion to produce them but not to surrender them. The owner of the largest portion is entitled to the possession. A purchaser is not bound to rely upon his equitable right to a production. He is entitled to their possession, or he may require at his own expense a written acknowledgment and consent to produce them and allow copies to be taken so far as may be material to his title. Fiduciary vendors, however, ought not to be required to give such an undertaking as it imposes a personal obligation.

Right to reimbursement of expenses.

32. Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust, or

the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary.

If he pays such expenses out of his own pocket, he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.

Right to be recouped for erroneous overpayment.

Where a trustee has by mistake made an overpayment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such overpayment.

Commentary.

The rule that no allowance shall be given to an executor or trustee for his trouble and care was thus explained by Lord Chancellor TALBOT, in *Robinson* v. *Pett*, 3 P. Wms. 247: "It is an established rule that a trustee, executor, or administrator, shall have no allowance for his care and trouble: the reason of which seems to be for that on these pretences if allowed the trust estate might be loaded and rendered of little value; besides the great difficulty there might be in settling and adjusting the quantum of such allowance especially as one man's time may be more valuable than another's; and there can be no hardship in this respect on any trustee who may choose whether he will accept the trust or not. The defendants renouncing an executorship and then acting is not material because he is still at liberty whenever he pleases to accept the executorship. Otherwise if all the executors renounce and the ordinary thereupon grant administration. And if this were to make any difference, it would be

an art practised by executors to get themselves out of this rule which I take to be a reasonable one and to have long prevailed."

The costs of trustees properly incurred in the administration of a trust whether by instituting or defending an action or otherwise are a first charge on both the capital and income of the trust fund; and they are not bound to part with the income till these trusts have been otherwise provided for.—*Stott* v. *Milne*, 25 Ch. D. 710; *Dodds* v. *Tuke*, 25 Ch. D. 617; *Creditor's Trust Fund*. Where a trustee is indebted to the trust estate, his debt may be set off against any costs due to him.—*Jagger* v. *Jagger*, L. R., 25 Ch. D. 729. Where on a devolution of property the *cestuis que trust* do not take proper steps to inform the executors as to their title, the executors may be excused on account of conduct which would otherwise have deprived them of their right to costs out of the trust fund and yet their conduct may be so far vexatious as to deprive them of the costs of a litigious appeal to the Court.—*Knight's Will*, 26 Ch. D. 82. Trustees are entitled not only to party costs but to costs as between solicitor and clients.—*In re Love*, L. R. 28 C. D. 348. Where one of a body of mortgagees is a solicitor and acts as such in enforcing the security, he is entitled to profit costs whether the mortgagees were trustees or not.—27 Ch. D. 544; *in re Donaldson*.

Overpayments may be recovered and that notwithstanding the Statute of Limitations if there have been no laches. And they will constitute a lien on other interests of the beneficiary even against an alienee for valuable consideration without notice.—*Griffiths* v. *Porter*, 25 Beav. 236; *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Livesey* v. *Livesey*, 3 Russ. 287.

Right to indemnity from gainer by breach of trust.

33. A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary, the trustee has a charge on his interest for such amount.

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

Commentary.

In England, the charge on the beneficiary's interest exists.—*Cooper* v. *Cooper*, L. R., 7 H. L. 53. But the beneficiary is not made

personally liable.—*Raby* v. *Ridehalgh*, 7 DeG. M. & G. 108; *Butler* v. *Butler*, 7 Ch. D. 116.

Right to apply to Court for opinion in management of trust-property.

34. Any trustee may, without instituting a suit apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

Commentary.

Under the corresponding statute in England passed at the instance of Lord ST. LEONARDS, 22 & 23 Vic., c. 35, section 30, trustees have been advised as to the appropriation of a fund for a legacy as to advancement, maintenance, and education out of capital change of investments, sales of houses, compromises, taking legal proceedings, &c. But the Court has refused to construe instruments or to make an order settling the rights of parties on a petition.

Right to settlement of accounts.

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is due to the beneficiary under

the trust, to an acknowledgment in writing to that effect.

General authority of trustee.

36. In addition to the powers expressly conferred by this act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the provisions of section seventeen, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.

Every trustee in the actual possession or receipt of the rents and profits of land as defined in the Land Improvement Act, 1871, shall, for the purposes of that Act, be deemed to be a landlord in possession.

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

Commentary.

"Land Improvement Act, 1871."—This Act is repealed in places in which the Land Improvement Loans Act, 1883 is declared in force. See Act XIV of 1883, sections 1 and 2: no definition of land is given in the latter Act. It originally extended to the whole of British India and enabled the landlord or tenant to obtain from the Collector advances of money to be expended in the improvement of agricultural or culturable lands.

"Land," means land used for agricultural purposes or waste land which is culturable.

Under section 9 of Act XXXV of 1858, (which applies to Oudh) the Court of Wards is authorised to take possession and charge the property of an adjudged lunatic as therein directed without any order of the Court in that behalf. Where the Court made an order appointing as manager of the lunatic's property, the same person who acts as manager under the Court of Wards, held, that a lease for

more than five years granted by such manager was valid as being within the powers of the Court of Wards, though under section 14 of the Act it was *ultra vires* of a manager appointed by the Court.—*Rae Sarabjit Singh* v. *Chapman*, L. R., 13 I. A. 44.

Trustees in exercising their discretion as to the amounts of maintenance to be allowed a father for his infant must consider what is most for the benefit of the infant. In doing so, they should take into account that the father is not of sufficient ability properly to maintain his child, and that it is for its benefit not merely to allow him enough to pay the actual expenses, but to enable him to give a better education and a better home. They are not to be deterred therefrom because such benefit may also benefit the father though on the other hand they must not act with a view to his benefit apart from the child.—*In re Lofthouse*, 29 Ch. D. 921.

The Court does not control a discretion given to trustees respecting education and maintenance allowances when it is honestly exercised.

Where an executor or other trustee employs an agent to collect money under circumstance which render such employment proper and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not occasioned by his own default, but upon the persons seeking to charge him to prove that it was.—*Brier* v. *Brier*, C. A., 26 Ch. D. 243. The rule that trustees acting according to the ordinary course of business and employing agents as prudent men of business would do on their own behalf are not answerable for the default of the agent so employed is subject to the limitation that the agent must not be employed out of the course of his own business. Trustees empowered to invest on mortgage, but under the advice of their solicitors invested a sum of £5,000 on mortgage of a freehold house and ground at Liverpool valued to them at from £7,000 to £8,000. The trustees did not exercise their own judgment as to the value, but accepted the advice of their solicitors that a London surveyor who had introduced the mortgage and had a pecuniary interest in its completion should act as valuer and they acted upon his report which was of an inflated character. The mortgagor afterwards became bankrupt and the property would not realize the sum advanced :—Held, that the trustees were jointly and severally liable to replace the sum advanced with interest at 4 per cent. from the date of the loan.—*Fry* v. *Tapson*, 28 Ch. D. 268.

Where absolute discretion has been given to trustees as to the exercise of a power, the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly or unreasonably. Where the power is coupled

with a trust or duty, the Court will enforce the timely exercise in a proper manner and but will not interfere with the trustees as to the particular time or manner of their *bonâ fide* exercise of it. A testator gave to his trustees a power to be exercised at their absolute discretion of selling real estates with a declaration that the proceeds should be applied at a like discretion in the purchase of other real estates. He also gave them power at their absolute discretion of raising money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will and a large sum of money paid into Court the proceeds of real estate sold one of the trustees proposed to apply the sum in purchase of another real estate, and to raise the remainder of the purchase-money by mortgage of the purchased estate. The other trustee refused to concur in the purchase. The Court of Appeal held that they could not control the discretion of the dissentient trustee either in respect of the new purchase, or of raising money thereon should the transaction be carried out.—*Tempest* v. *Lord Camoys*, 21 Ch. D. 571.

A testator gave to his trustees a special power of leasing at their absolute discretion, which formed part of a special scheme of management of his mansion-house and estate for a limited period: In a suit for the execution of the trusts of a will the Court would compel the trustees to execute the power of leasing.—*Tempest* v. *Lord Camoys*, 21 Ch. D. 576*n*.

Where a trustee with power to purchase land, lends at the request of the *cestuis que trust* part of the purchase-money, his lien on the estate purchased is secondary to the charge of the full amount of the trust-money invested in the purchase.—*Worcester City and County Banking Company* v. *Blut*, 22 Ch. D. 255.

The majority of the Uralars of a Malabar Devaswam agreed to renew a kanam on terms beneficial to the devaswam after the question of renewal had been fairly considered by all the Uralars. TURNER, C. J. and KINDERSLEY, J., held that the decision of the majority was binding upon a dissentient minority.—*Teramath* v. *Lakshmi*, I. L. R., 6 Mad. 270.

A trustee in liquidation of a shareholder who has transferred his shares by way of mortgage but whose transfer has not been registered by the company on the ground of the shareholder being indebted to them is entitled to be placed on the register of shareholders subject as to the shares to all the equities attaching thereto —*Cannock and Rugeley Colliery Company*, 26 Ch. D. 522.

A trustee who has the legal estate and takes from his *cestui que trust* an assignment of his interest by way of security for money advanced can avail himself of the legal estate as against a prior

encumbrance of which he had no notice. The note in Sugden's Vendors and Purchasers, (14th ed., p. 379) on *Browne* v. *Savage* is incorrect.—*Newman* v. *Newman*, 28 Ch. D. 674.

Power to sell in lots, and either by public auction or private contract.

37. Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

Commentary.

The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise in any conditions of sale or contract for sale as he thinks fit and may also buy in the property or any part thereof at any sale by auction and rescind or vary any contract for sale and resell the property so bought in, or as to which the contract is so rescinded without being responsible to the beneficiary for any loss occasioned thereby.

Where a trustee is directed to sell trust-property, or to invest trust money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Neither an executor or administrator or other trustee for sale can enter into a binding contract for sale at a future time inasmuch as the trust estate may meanwhile increase in value; nor can they grant an underlease with an option to the underlessee to purchase within seven years.—*Oceanic Steam Navigation Company* v. *Sutherberry*, 50 L. J. Ch. 308; 16 Ch. D. 236.

Fiduciary vendors are in a different position from absolute owners and are surrounded by pitfalls to which other persons are not exposed. Though a large discretion may have been reposed in them by the author of the trust or the legislature and though they act on the advice of responsible advisers, they must not use a depreciatory condition and must take the consequences if they are led into any mistake.—*Dance* v. *Goldingham*, L. R. 8 Ch. 902; *Dunn* v. *Flood*, 28 Ch. D. 586. The consequences are that the sale may be set aside with costs by a purchaser who has become dissatisfied with his bargain.—*Marsh* v. *Lord Granville*, 24 Ch. D. 11. Each case must be decided on its merits, but the following decisions may be useful as exampled. Trustees may, when such a course will be advantageous to the beneficiary, join with the trustees for sale of another property, or with the

owner of another property in selling the two properties in one lot at an enter price. If they are reversioners on a beneficial lease, they may join the lessee in selling the fee simple in possession for a lump sum leaving the price to be apportioned fairly between the sellors. The preferable mode of apportioning is to have both properties or both interests valued separately before the sale, and to divide the actual prices between them in those proportions.—*Morris* v. *Debenham*, 2 Ch. D. 540.—Cooper and Allens Contract, 4 Ch. D. 807. It seems that they may limit the title to ten years if the property is to be sold in small lots, and they have no earlier deeds in their possession, on the ground that a title so limited will save expense both to the vendors and purchasers.—*Dunn* v. *Flood*, 28 Ch. D. 586. They may stipulate that all objections to the title shall be taken within a certain time and that if an objection be taken which they cannot or will not comply with or remove, they may rescind the contract on returning the deposit without interests, costs or compensation.—*Mawson* v. *Fletcher*, 6 Ch. 91; *Gray* v. *Fowler*, L. R. 8 Ex. 249. When the property is in hand or is not known to be subject to restrictive conditions except such if any as are specifically mentioned in the particulars, they may not use the ordinary condition that the sale is subject to all existing tenancies and restrictions if any unless they also use a condition for compensation.—*Dunn* v. *Flood*, 28 Ch. D. 586. A condition that recitals in any abstracted document shall be conclusive may be justifiable in some peculiar cases of sale by trustees but the circumstances must be very special, S. C. On the other hand trustees buying land are, as a general rule, not at liberty unless authorised by the instrument creating the trust to buy subject to stipulations which prevent them from getting a perfect title or the usual evidence of title or a title not strictly marketable.—Dart, 89.

In cases where trusters deem it desirable to give their trustees surer protection than the Indian Trust Act, 1882, and the English Conveyancing Acts 1881, 1882 seem to do the following clause may be inserted in the declaration of trust: "And I declare that in addition to the ordinary powers indemnity and right to reimbursement by law given to trustees, my trustees and trustee may [sell any hereditaments subject to any conditions which could be used on a sale by an absolute beneficial owner and which though not required by the state of the title or of the property, they or he may deem expedient or may be advised to use and may] dispense wholly or partially with the investigation or production of the lessor's title on lending money or leasehold hereditaments and generally may [sell, purchase] take upon [partition, enfranchisement, exchange or] mortgage any hereditaments with less than a marketable title and shall not be answerable for any loss arising thereby or from any defect in the title to or

value of any such hereditaments: (2) And that any executor or trustee doing business or acting in relation to my estate or any part thereof as solicitor, agent, banker or broker, or in any other capacity whether such business shall or shall not fall within the scope of his profession, business, or calling, shall be entitled to charge and shall be remunerated out of my estate or other the trust-property as a stranger: (3) And that my executors and trustees respectively may, instead of acting personally, employ at the expense of my estate or other the trust-property any solicitor, agent, banker or broker, or other professional person to transact any business receive pay or deliver any money or securities or do any thing in relation to my estate, or other the trust-property without being answerable for any loss arising therefrom."

Power to sell under special conditions.

38. The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy-in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Power to buy-in and re-sell.

Time allowed for selling trust-property.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Illustrations.

(*a*) A bequeaths property to B, directing him to sell it with all convenient speed and pay the proceeds to C. This does not render an immediate sale imperative.

(*b*) A bequeaths property to B, directing him to sell it at such time and in such manner as he shall think fit and invest the proceeds for the benefit of C. This does not authorise B, as between him and C, to postpone the sale to an indefinite period.

Commentary.

Every necessary and no unnecessary condition ought to be attached to the contract of sale. See note to section 37.

39. For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

Power to convey.

40. A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of the securities mentioned or referred to in section twenty, and from time to time vary any such investments for others of the same nature :

Power to vary investments.

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing.

41. Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property ; and such trustee shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in any of the securities mentioned or referred to in section twenty, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen : Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Power to apply property of minors, &c., for their maintenance, &c.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.

Commentary.

"Where any property is held." "The income to which he may be entitled."

Are reversionary and contingent interests included? "yes." "Both the words and purview of the Act seem to include them."

It is the duty of a father, if alive, to maintain his infant children. The Court does not direct maintenance without inquiring as to his ability. No such inquiry is directed when a widow applies.

Allowances for maintenance or maintenance and education were placed in the discretion of the Court of Wards for the benefit of minors not being European subjects by Act XL of 1858, sections 11 and 25 and Act IV (Ben.) of 1870, sections 86 and 64; in the Presidency of Bombay by Act XX of 1864, which contains similar provisions; in the Presidency of Fort St. George by Act XXI of 1855, for the benefit of all male minors within the jurisdiction; and throughout the Punjab, the Central Provinces, &c., for European British minors by Act XIII of 1874.

An executor who is also devisee of an estate charged with debts may be presumed by an honest purchaser or mortgagee to be dealing with it for the purposes of administration, and may give a valid title to it. Such purchaser or mortgagee therefore will not be bound to see to the application of the purchase-money. Mere absence of statement of the purpose for which the sale or mortgage-money was to be used will not raise a presumption of knowledge that the money was to be employed otherwise than properly for the payment of the testator's debts. On a creditor of the testator who impeaches the validity of the mortgage or purchase lies the burden of proving that the pur-

chaser or mortgagee had notice of the true state of the facts.—*Corser* v. *Cartwright*, L. R., 7 H. L. 731. The same rule applies to purchases from a Hindu devisee.—*Greender Chunder Ghose* v. *Mackintosh*, I. L. R., 4 Cal. 897.

Purchase-money should be paid to the vendor personally. An agent or solicitor has no implied authority to receive and a purchaser paying money to a person not authorised to receive it is liable to pay it a second time. The possession by the solicitor of the conveyance with a signed receipt is not sufficient authority, nor is the receipt conclusive evidence of payment.—*Winter* v. *Anson*, 3 Russ. 488. But payment to one of several trustees on a receipt signed by all has been held sufficient.—*Webb* v. *Ledsam*, 1 K. & J. 385. Last wills and testaments sometimes charge the real estate with payment of debts sometimes in addition devise the estates charged or a portion of them to the executors or other trustees for that or other purposes. A simple charge leaves matters where they were really being liable where the personalty is insufficient for such payment. Nevertheless in *Robinson* v. *Lowater*, 17 Beav. 592 and *Wrigley* v. *Sykes*, 21 Beav. 337. The Lords Justices held that such a charge gave the executors an implied power to sell the realty though devised to others. Lord ST. LEONARDS thought such holding incorrect. The opinion of Lord ST. LEONARDS which was adopted in Griffith's Institutes has prevailed and whenever executors who are not devisees sell for payment of debts real estate the devisees thereof must concur in the conveyance. —*In re Tanqueray* v. *Willaume and Landan*, 20 Ch. D. 465. It is presumed that section 39 does not include such cases.

Power to give receipts.

42. Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

Power to compound, &c.

43. Two or more trustees acting together may, if and as they think fit—

(*a*) accept any composition or any security for any debt or for any property claimed;

(*b*) allow any time for payment of any debt;

(*c*) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust; and,

(*d*) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force.

Commentary.

The previous powers of trustees to compound debts allow time and compromise actions are summarised in this section; which is further beneficial to the trustee in shifting the onus of proof from him to the beneficiary on the impeachment of any transaction.

"Acting together."—These words seems to exclude the compounding when only sanctioned by a majority unless in trusts of a public character or where a majority is empowered to act.—Conveyancing Acts, 1881 and 1882, by W. & T., section 37.

An executor may be considered as a trustee. But a power to an executor to compound would not include an administrator who might be merely a creditor or some one not necessarily a proper person to be intrusted with so large a discretion.—*Clay and Tetley*, 16 Ch. D. 3.

87177

This section seems to make the trustees a quasi judicial body and to exonerate them like other arbiters or judges from the consequences of a mistake made by them. In so doing it does not relieve them from the judicial duties of observing legal formalities making proper enquiries seeking for the best evidence and acting conscientiously.—*Ex parte Ogle*, 8 Ch. Ap. 716. The Statute of Limitations which only bars the remedy without extinguishing the right never precluded the executor from paying a debt barred by the statute that is never justly did so.—*Mohesh Lal* v. *Busunt Kumaree*, I. L. R. 6 Cal. 340.

"Debt account claim or thing whatever."—These words extend to claims of legatees.—*Re Warren*, 51 L. T., N. S., 561; 53 L. J., N. S., Ch. 1016. The words seem to enable executors where a residue consist of a great variety of securities to appropriate some to one legatee and some to another making the distribution at the market price of the day. But at least where infants are concerned who cannot give a personal consent, it would be highly dangerous to do so without the advice or sanction of a Court. Executors and trustees after discharging the funeral and testamentary expenses and debts and legacies may come to a conclusive settlement with one of several residuary legatees separately.—*Peterson* v. *Peterson*, L. R., 3 Eq. 111.

To save the expenses of a foreclosure action, trustees who are mortgagees may release the equity of redemption of lands mortgaged for more than their value.—Lewin, 8th ed., 593.

If a mortgagor is ready to pay off the debt on a transfer of the security unless the trustees release part of the land and the remainder be still an ample security and the mortgage be still a beneficial one the trustees may release.—*Whitney* v. *Smith*, 4 Ch. App. 513. As a power to invest on mortgage implies a power to vary securities, the purchaser would not be bound to see that the transaction did not involve a breach of trust.—2 Davidson's Prec., 3rd ed., 835; 2 V. & P., by Dart., 5th ed., 612. Trustees need not consolidate securities from one mortgagor and may allow one or more to be redeemed separately, if the margin of value on those retained is sufficient to justify at the time a present advance equal to the amount on the securities redeemed.—Lewin, 8th ed., p. 593. Trustees for sale of a limited interest may agree with owners of the residue for the sale of the entirety leaving the subsequent apportionment of the price to the Court.—*Powlett* v. *Hood*, L. R. 5 Eq. 115.

The interpretation clause rather than the second proviso of this section appears to exclude the directors of a trading company from the purview of this section. Under the general law of partnership

as managing trustees they would have most, if not all, the powers conferred on ordinary trustees.

Power to several trustees of whom one disclaims or dies.

44. When an authority to deal with the trust-property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Suspension of trustee's powers by decree.

45. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the Appellate Court.

Commentary.

The effect of this section may vary according to the state of the suit and the relative position of third persons.—In *Berry* v. *Gibbons*, 8 Ch. 747, a decree had been made in a creditor's suit for the administration of the personal estate of the testator, but no receiver had been appointed nor injunction granted to restrain the executrix from dealing with the assets. More than two years after the decree the executrix who has also the sole legatee opened an account with a bank as such executrix. Having overdrawn the account, she deposited with the bank a picture belonging to the testator's estate. It was argued that the bank ought to have searched the register for a *lis pendens* which would have given them notice of the suit. However, JAMES, L. J., said, "in my opinion the executrix had the legal right to make such a deposit. In order to deprive the bank of the benefit of it, there must be evidence to show that they had notice of some breach of trust in the transaction. The doctrine of *lis pendens* has no bearing on the case; for a mere administration decree no receiver having been appointed nor any injunction granted to prevent the executrix from dealing with the assets would not take away her legal powers."

CHAPTER V.

OF THE DISABILITIES OF TRUSTEES.

These disabilities are the legal negations of certain rights and powers appertaining to the owners and managers of property and legal officials.

Trustee cannot renounce after acceptance.

46. A trustee who has accepted the trust cannot afterwards renounce it except (*a*) with the permission of a principal Civil Court of original jurisdiction, or (*b*), if the beneficiary is competent to contract, with his consent, or (*c*) by virtue of a special power in the instrument of trust.

Trustee cannot delegate.

47. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (*a*) the instrument of trust so provides, or (*b*) the delegation is in the regular course of business, or (*c*) the delegation is necessary, or (*d*) the beneficiary, being competent to contract, consents to the delegation.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section

Illustrations.

(*a*) A bequeaths certain property to B and C on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. B dies. C may bequeath the trust-property to D and E upon the trusts of A's will.

(*b*) A is a trustee of certain property with power to sell the same. A may employ an auctioneer to effect the sale.

(*c*) A bequeaths to B fifty houses let at monthly rents in trust to collect the rents and pay them to C. B may employ a proper person to collect these rents.

Commentary.

The general rule of the English law is that he who does an act through the medium of another party is considered as doing it

himself (Coke on Littleton, 258*a*). Such is the principle upon which the law of agency rests. For example, an assent to a composition bankruptcy deed may be given by the town agents of a creditor's solicitor in the country.—*Johnson* v. *Ossenton*, 38 L. J. Ex. 76. The principle however is not of universal application. Thus delegated jurisdiction cannot be delegated, the ordinary rule being that although a ministerial officer may appoint a deputy, a judicial one cannot. A Magistrate's right is personal to himself and a trust that he cannot delegate to another.—*Entick* v. *Carrington*, 19 Howell's State Trials, 1063. Delegated authority cannot be redelegated without the consent of the principal.

In A.D. 1868, the plaintiff consigned a ship to G. & Co. in China for sale fixing a minimum price of $90,000 and requiring cash payment. G. & Co. employed the defendant in Japan to sell the ship with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant having vainly endeavoured to sell the ship on the terms mentioned took her himself for $90,000 and about the same time sold her to a Japanese Prince for $160,000 payable as to $75,000 in cash and the rest on credit. The plaintiff was not informed that the defendant had purchased the vessel himself or, that he had re-sold it till June 1869 after the transaction was completed. The plaintiff paid $90,000 to G. & Co. who remitted it to the plaintiff and eventually obtained the whole of the $160,000 from the Japanese Prince. A.D. 1879, the plaintiff filed a bill to make the sub-agent account for the profit and obtained a decree that the profit should be paid over to himself.—*De Bussche* v. *Alt.*, 8 Ch. D. 314.

Although a deputy cannot transfer his entire powers to another, yet one possessing general powers may, in many cases, constitute another person, his servant or agent for the purpose of doing some particular act; provided such act be within the scope of his own legitimate authority. Thus notwithstanding the present section a trustee may appoint a solicitor to commence or defend legal proceedings.

A firm of solicitors were employed to receive the proceeds of a testator's land which was bought by a Railway Company. They did so and paid it over to one of two trustees. He became insolvent and died. The Court held that the solicitors were liable for paying the money to one trustee alone, though he was also an executor.—*Lee* v. *Sankey*, L. R. 15 Eq. 204.

Trustees allowed property settled upon the marriage of a lady to remain uninvested in the hands of a co-trustee the lady being aware

of the facts. The co-trustee subsequently lost the property and became insolvent. The lady's acquiescence was held a bar to her obtaining relief from the other trustees.—*Jones* v. *Higgins*, L. R. 2 Eq. 538.

If her acquiescence had been induced by the fraud of the other trustees, they would have been liable.—*Walker* v. *Symonds*, 3 Swans, 1.

A trustee who acts unreasonably in delaying to join in a conveyance though guilty of no actual misconduct further than that shown by an unwarrantable delay in doing that which he is bound to do will be made to pay the costs of a suit brought against him for the purpose of compelling him to do his duty notwithstanding that neither an offer to pay such costs as he might incur attending the execution of the conveyance nor a tender of release from his position as trustee has been made to him. He however may still be allowed his costs attending the conveyance when completed. PIGOT, J.—*Mackertich* v. *Rebeiro*, I. L. R. 11 Cal. 638.

Where no person but the settlor is interested, the deed may be regarded as a mere direction as to the mode in which such settlor's property should be enjoyed and applied for his benefit and as such revocable by the settlor.—*Kanye Dass Byragee* v. *Ramgopal Ghose*, 16 S. D, A. 23. But any one who can claim under the settlement, even a child unborn at its execution, may prevent its revocation unless a power of revocation was reserved by the terms of the instrument.—*Bill* v. *Cureton*, 2 M. & K. 503. The last case was followed in *Golam Yassein* v. *The Official Trustee of Bengal*, by CUNNINGHAM, J.—I. L. R. 8 Cal. 887. In that case A being at the time unmarried executed a voluntary settlement by which he created trusts for himself for life, and after his death, for his issue and widows, if any, with ultimate trusts over. The deed contained a provision empowering A at any time with the consent of the trustee to revoke the trusts and to declare other or new trusts. A subsequently married, and after his marriage, executed a deed of revocation declaring that the property should be held for himself absolutely. The trustee refused to hand over the trust-property, and thereupon A instituted a suit to set aside the trust-deed. His wife was a minor, and there was no issue of the marriage. Held, that although there might be cases in which no person but the settlor was interested, the deed might be regarded as a mere direction as to the manner in which the settlor's property should be applied for his own benefit and as such revocable by the settlor, yet that in the present case there being an infant beneficiary the deed could not be revoked.

When a discretionary trust is delegated, not only is the trustee responsible for all the mischievous consequences, but the acts of the substitutes are void.—*Hitch* v. *Leworthy*, 2 Hare, 200; *Bradford* v. *Belfield*, 2 Sim. 264. Trustees however may and ought to inquire what are the wishes and opinions of those interested before determining finally what may be expedient and will not be held to act against their own judgment should they in the end disregard objections to which they had previously given weight.—*Fraser* v. *Murdoch*, 6 App. Cas. 855. A delegation of a discretionary trust whether to a co-trustee, co-executor, or stranger is equally bad.—*Att-Gen.* v. *Gleg*, 1 Atk. 356. It is this rule which prevents the transfer of the estate by the trustee carrying with it the power or the trust except under some special authority as that contained in section 75. And so if a trustee devise the estate, the devisee cannot usually administer a discretionary trust. But a settlement may contemplate such an event and by vesting the powers in the trustee and his assign annex them to the estate in the hands of the devisee.—*Burtt's Estate*, 1 Drew, 319. Without the use of the word 'assign,' he may intend that a trustee should devise both the estate and the powers.—*Osborne* v. *Rowlett*, 13 Ch. D. 774.

Necessity whether legal or moral will excuse the delegation of ministerial acts. Moral necessity includes the regular course of business, prudent acts according to the usage of mankind. Thus, if a trustee orders rents to be paid to a banker, then in good credit, but who subsequently fails the trustee, is not made responsible for any loss.—*Clough* v. *Bond*, 3 M. & Cr. 497; *In re Speight*, 22 Ch. D. 727; 9 App. Cas. 1. *In re Speight*, a trustee employed a broker in the ordinary course of business to invest trust funds in proper securities authorized by the trust. On the receipt of the bought-note, he handed over the cheque to the broker who misappropriated it. "Held, that the trustee having acted in the ordinary course of business was not liable to make good the loss occasiond by the embezzlement of the trust funds by the broker."

In all Acts made by the Governor-General of India in Council after the General Clauses Act, 1868 came into operation it is sufficient "For the purpose of expressing that the law relative to the chief or superior of an office applies to the deputies or subordinates lawfully executing the duties of such office in the place of their superior" to prescribe the duty of their superior.—Section 3, § 4.

Co-trustees cannot act singly.

48. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

Commentary.

An act done by one trustee may be ratified by another, but evidence of the ratification should be preserved.—*Lee* v. *Sankey*, L. R. 15 Eq. 204. If one refuses to act the other cannot act without him.—*Doyly* v. *Sherratt*, 2 Eq. Ca. Abr. 742*d*. One of several executors may prove a debt in bankruptcy but not one of several trustees.—1 Dear. 39. In defending an action the rule is that they be allowed only one set of legal advisers.

Control of discretionary power.

49. Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

Commentary.

Trustees may not anticipate the proper period for the exercise of their discretion by affecting to release it, or pledging themselves as to the mode in which they will exercise. They must consider the circumstances existing at the proper time.—*Weller* v. *Ker*, L. R. 1 Sc. App. 11; *Moore* v. *Clench*, 1 Ch. D. 447. To leave trust money upon a hazardous security where the power only authorises an investment upon Government security or real or personal property justifies the interference of the Court.—*Costello* v. *O'Rorke*, Irish Rep. 3 Eq. 172. Where the conduct of the trustee is within the letter of their power the burden of showing that it is ruinous mischievous or fraudulent is upon the party who challenges it.—*In re Brittlebank*, 30 W. R. 99.

Trustee may not charge for services.

50. In the absence of express directions to the contrary contained in the instrument of trust or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

Nothing in this section applies to any Official Trustee, Administrator-General, Public Curator, or person holding a certificate of administration.

Commentary

The general rule is that no one who has a duty to perform shall place himself in a position to have his interests conflicting with that duty and a case for the application of the rule is that of a trustee

himself doing acts which he might employ another to do. As the trustee might make the payment to others, the Court says, he shall not make it to himself, and the Court says, the same in the case of agents, mortgagees, solicitors, and others that may employ paid assistance. The good sense of the rule is apparent when we consider that it is one of the duties of a trustee to see that an employee makes no improper charges against the estate.—*Broughton* v. *Broughton*, 5 D. M. & G. 164; *Robinson* v. *Pett*, Talbot L. C., 3 P. Wms. 247. When a solicitor has liberty to charge, he can only include in his bill professional charges not items which an executor would perform without a solicitor.—*Harbin* v. *Darby*, 28 Beav. 325. An auctioneer who is a mortgagee cannot charge commission for selling the estate.—*Matthison* v. *Clarke*, 3 Drew. 3. A receiver is not a creditor in respect of acts which are not ordered.—*In re Ormsby*, 1 B. & B. 189. The committee of a lunatics estate is within the principle of the rule. No allowance will be made except where the benefit of the estate requires it for example he will be allowed to pay an agent to collect rents which he cannot collect.—*In re Westbrooke*, 2 Phil. 631.

A surviving partner who is an express trustee or executor will not, in the absence of an authority for the purpose, be entitled to charge for carrying on the business any thing more than the expenses out of pocket.—*Barrett* v. *Hartley*, L. R. 2 Eq. 789. Where the surviving partner is not an express trustee or executor, he will have to account for the profits but proper allowances will be made for the management of the business.—*Forster* v. *Ridley*, 4 DeG. J. & S. 452.

Trustee may not use trust-property for his own profit.

51. A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

Commentary.

"If trustees or executors buy up any debt or incumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the profit to themselves but the creditor's legatees or other beneficiaries shall have the advantage of it."—Lewin, A. D. 1885, p. 276. But if a trustee buy up a debt intending it for the beneficiaries and they refuse it, they cannot subsequently assert a right to profits subsequently made.—*Barwell* v. *Barwell*, 34 Beav. 371. The same principles apply to the purchases of fixtures and other property and to all persons in a fiduciary position as well as to express trustees.

52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

Trustee for sale or his agent may not buy.

53. No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

Trustee may not buy beneficiary's interest without permission.

And no trustee whose duty it is to buy or to obtain a mortgage or lease or particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

Trustee for purchase.

See section 62.

54. A trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.

Co-trustees may not lend to one of themselves.

Commentary.

Trustees having a power to lend with the consent of a tenant for life money on personal security cannot lend it to the said tenant on his personal security. The Court would disregard such a power and invest only on the usual securities.—Lewin.

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

The word "right," is explained in the note to Chapter IV.
The word "liability," in the note to Chapter III.
The word "beneficiary," in the interpretation, Section No. 3.

55. The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

Rights to rents and profits.

Commentary.

The trustee possesses a legal ownership (*dominium directum*), the beneficiary the use (*dominium utile or inferius*).

56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest ;

Right to specific execution.

and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

Right to transfer of possession.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage.

Illustrations.

(*a*) Certain Government securities are given to trustees upon trust to accumulate the interest until A attains the age of 24, and then to transfer the gross amount to him. A on attaining majority may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(*b*) A bequeaths Rs. 10,000 to trustees upon trust to purchase an

annuity for B, who has attained his majority and is otherwise competent to contract. B may claim the Rs. 10,000.

(c) A transfers certain property to B and directs him to sell or invest it for the benefit of C, who is competent to contract. C may elect to take the property in its original character.

Commentary.

A *cestui que trust* who with knowledge that his trustee has committed a breach of trust obtains from him a part only of that to which he is entitled does not thereby waive his right to such further relief as he may be able to obtain unless an intention so to do can be implied from surrounding circumstances—*In re Cross*, 20 Ch. D. 109.

"Any person having the possession or control of a particular article of moveable property, of which he is not the owner may be compelled specifically to deliver it to the person entitled to the immediate possession when the thing claimed is held by the defendant as trustee of the claimant." This rule is illustrated as follows: A proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B without A's authority pledges the furniture to C and C knowing that B had no right to pledge it advertises it for sale. C holds as A's trustee.—Specific Relief Act (1 of 1877), section 11. Griffith's Institutes, p. 110.

If a fund is given to trustees upon trust to accumulate until A attains 25 or other age beyond majority, A on attaining majority may, as the person exclusively interested, demand and obtain payment of the fund to himself immediately.—*Magrath* v. *Morehead*, L. R. 12 Eq. 491. An express devise in trust for a beneficiary on his attaining 25 unless there be another devise of the estate for the period between that age and the beneficiary's majority or an evident intestacy thereof would be construed so as to give the beneficiary the right to obtain the absolute estate at majority—*Gosling* v. *Gosling*, 1 John, 265. So a legacy on trust to purchase an annuity may be claimed without going through the form of purchase.—*Dawson* v. *Hearne*, 1 R. & M. 606.

Right to inspect and take copies of instrument of trust, accounts, &c.

57. The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust-property and the vouchers (if

any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

Commentary.

The rule of the English Chancery a rule which dates from the reign of Richard II, see Griffith's Institutes of Equity, pp. 8—10 is according to the better opinion applicable as against the managing member of a joint Hindu family.—*Abhaya Chandra Roy Chowdry* v. *Pyari Mohan Guho*, 5 B. L. R. 347. This was a full Bench decision and COUCH, C. J., said, "The members of a joint Hindu family are entitled to the family property subject to such dispositions of it as the managing member is entitled to make either by virtue of the power which is given him as managing member by law, or the powers that may be given him by consent of the other members of the family. Subject to the exercise of these powers, and to any disposition of any portion of the family property which may have been made by virtue of them, the other members of the family are clearly interested in that property. It appears to me that the principle upon which the right to call for an account rests is not as has been supposed the existence of a direct agency or partnership where the managing partner may be considered the agent of the copartners. It depends upon the right which the members of a Hindu family have to a share of the joint property; and where there is a joint interest in the property and one party receives all the profits, he is bound to account to the other parties who may have an interest in it for the profits of their respective shares after making such deductions as he has the right to make. That appears to me to be the right principle, and it is the principle upon which the English Courts of Equity act in the case of joint tenants and tenants in common and not merely in cases of partners."

A trustee who stands by and sanctions the rendering of improper accounts by a defaulting trustee, becomes himself liable for the misrepresentation.—*Horton* v. *Brocklehurst*, (No. 2) 25 Beav. 504.

58. The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest:

Right to transfer beneficial interest.

Provided that when property is transferred or bequeathed for the benefit of a married woman, so

that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

Commentary.

An assignee of an equitable interest is bound by all the equities affecting it as between himself and assignee and any person not claiming under them. The rule does not regulate the rights of two assignees as between themselves. The doctrines of notice then become important. The questions involved arise in the multiform practice of conveyancing and therefore may be best answered by examples. A person takes an equitable mortgage with notice of a prior charge and transfers to an assignee without notice. The assignee is bound by the charge. A mortgage or sale is fraudulently obtained by B who transfers to C, C having no notice of the fraud is nevertheless bound by the equity of the party defrauded.—*Barnard* v. *Hunter*, 2 Jurist, N. S. 1213. A trustee having a beneficial interest in and being also indebted to the trust, assigns his interest to a stranger. The assignee is bound by the debt.—*In re Knapman*, 18 Ch. D. 300.

A creditor who has been paid part of his debt transfers the entire debt to an assignee without notice. The assignee is bound by the state of accounts at the time of the assignment.—*In re Natal Investment Company*, L. C., 3 Ch. App. 355.

Shares in a company which are legally transferable are not subject in the hands of a transferree in good faith and without notice, or in the hands of such a person with a legal right to be registered to equities affecting the transferor.—*Briggs* v. *Massey*, 42 L. T., N. S. 49. Indian Companies Act, 1882, section 53.

An assignee is liable to equities arising from a set-off as well as to those arising from actual payments.—*Cavendish* v. *Geaves*, 24 Beav. 163; *Dublin and Rathcole Railway*, 1 L. R.; Irish, 198. A set-off is not allowed where a person has a right in one character and a liability in another.—*In re Hodgson*, 9 Ch. D. 673; *E. P. Moner*, 12 Ch. D. 491. A right to damages against an assignor which does not ripen into a debt until after the assignment of a debt due to him cannot be set-off against the debt due to the assignor and assigned by him.—*E. P. Theys*, 25 Ch. D. 587. The Code of Civil Procedure, 1882, section 111, contains other illustrations of set-offs and provides for their statement and demand.

The rule of general jurisprudence adopted by the English law is that no one can transfer to another a greater right than he possesses.

—Justinian's Digest, 50, 17, 54. The common law created an exception in the case of sales of property in market overt, Mercantile law, an exception in the cases of negotiable instruments and equity an exception in the case of a purchase of an estate in land for value, and without notice of another's right thereto.—*Basset* v. *Nosworthy*, Reports Time of Finch, L. R. 102. Generally the assignee has the use of the rights of the assignor only whether the assignor be a trustee or other qualified owner.—*Mancharji Sorabji Chulla* v. *Kongseo*, 6 Bom. H. C. R., O. C. 59; *Hakeem Meah* v. *Beejoy Patnee*, 22 W. R. 8. Where a person other than the vendor is in possession of the estate, the purchaser is bound to inquire into the nature of the possession. 22 W. R. 8.—*Caballero* v. *Henty*, L. R., 9 Ch. App. 447.

Notice before actual payment of the money or execution of the conveyance is binding in the same manner as notice had before the execution of the contract.—*Tourville* v. *Naish*, 3 P. Wms. 307; *Sharpe* v. *Foy*, L. R., 4 Ch. App. 35.

Mere vague reports from strangers or general assertions that some other person claims a title does not affect a person with actual notice.—*Barnhart* v. *Greenshield*, 9 Moore, P. C. C. 36; *Natal Land, &c. Company* v. *Good*, L. R., 2 P. C. 21.

What will amount to notice arising from wilful abstention from inquiry or gross negligence preventing the knowledge of an important fact various in different cases from the construction placed by the Court upon the circumstances. See the interpretation clause, section 3. What is sufficient to give constructive notice to an actual trustee is not sufficient to raise a constructive trust in a third party. —*Williams* v. *Williams*, 17 Ch. D. 437. Where in order to keep the notice of a trust off a mortgage deed, a recital is introduced that the mortgagors, that is the actual trustees, are jointly entitled on a joint account the Court will not allow an inquiry upon the point.—*Harman and Uxbridge Railway Company*, 24 Ch. D. 720.

A solicitor's client will be affected with constructive notice of a trust the existence of which is known to the solicitor even although the solicitor may have committed a fraud in relation to that trust. —*Boursot* v. *Savage*, L. R., 2 Eq. 134. The mere fact of two companies having the same solicitor or some directors in common does not affect each company with notice of everything that is done by the other.—*Marseilles Extension Railway Company*, L. R., 7 Ch. App. 761; *European Bank*, L. R., 5 Ch. App. 358.

Where statements by a would-be borrower to the bank manager were such as to have clearly put the bank upon inquiry which would if made have led to the detection of a fraud and to the refusal

of the advance and so have affected the bank with constructive notice of the fraud, the equity of the bank will be postponed.—*National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1.

A solicitor's possession of documents is of itself notice that he has a lien for costs thereon.—*West of England Bank* v. *Bachelor*, 51 L. J., N. S., Ch. 199. If a beneficiary charge his interest without giving notice to a trustee, or the trustee having received notice dies, and a new one is appointed who having no notice of the charge purchases or becomes mortgagee of the said interest, he is in the position of an assignee who has given notice of his own assignment.—*Phipps* v. *Lovegrove*, L. R., 16 Eq. 80; *London Chartered Bank of Australia* v. *Lempriere*, L. R., 4 P. C. 572. A bankrupt before adjudication contracted to sell some lease-hold property and received a deposit in respect of the purchase-money. After adjudication but before receiving notice of the bankruptcy the purchaser paid him the balance. The Court held that it was the purchaser's misfortune to have paid the money to a person who had ceased to be the owner, but his only equity was to have the lease-hold on paying again the price to the trustee in bankruptcy.—*E. P. Rabbidge*, 8 Ch. D. 367.

Notice to a person who is not actual trustee at the time but probably will and become such and does so is not sufficient. A had a first charge, B a second charge on the proceeds to arise from the sale of an officer's commission. B first and then A gave notice to the Army agent of the regiment; but both notices preceded the time when the agent actually assumed the character of trustee. A retained his priority.—*Roxburghe* v. *Cox*, 17 Ch. D. 520; *Calisher* v. *Forbes*, L. R., 7 Ch. App. 109. The section speaks only of purchasers. As between volunteers notice is not necessary. When notices are served simultaneously, priority of date determines their rank. The notice should be given to the trustees themselves unless their solicitor is authorized to receive it.—*Saffron Walden, Second Benefit Building Society* v. *Rayner*, 14 Ch. D. 406. When the trust fund consists of shares, notice may be given to the Secretary.—*Alleston* v. *Chichester*, L. R., 10 C. P. 319. Notices to a Director to an actuary to the Board of Directors have been held sufficient.—*In re Agra Bank*, L. R., 3 Ch. App. 555. Negotiation for the assignment of a policy of insurance through a solicitor the local agent of the company is not notice to the company.—*Russells Policy Trusts*, L. R. 15 Eq. 26. A solicitor to trustees was also a creditor under an insolvency, the trustees were not thereby affected with notice of the insolvency.—*Browns Trusts*, L. R., 5 Eq. 88. Where trustees have paid money into Court, notice may still be served upon them, but the proper course is to obtain a stop order.—*Mutual Life Assurance Company* v. *Langley*, 26 Ch. D. 686; *Elder* v. *Maclean*, 3 Jurist, N. S.

383. If there is no express trustee at the time of the stock, notice should be served on the bank or other holder.—*Etty* v. *Bridges*, 2 Y. & C. C. C. 86. Giving notice or obtaining a stop order gains no priority for the purchaser over an incumbrance of which he has notice at the time of his purchase.—*Warburton* v. *Hill*, Kay, 470.

Right to sue for execution of trust.

59. Where no trustees are appointed or all the trustees die, disclaim or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

Commentary.

Chapter XXXVI of the Civil Procedure Code enables the Courts including the Mofussil Courts of Small Causes, whenever it appears necessary for the realization, preservation or better custody or management of any property moveable or immoveable the subject of a suit or under attachment by order to (*a*) appoint a receiver of such property; and if need be (*b*) remove the person in whose possession or custody the property may be from the possession or custody thereof; (*c*) commit the same to the custody or management of such receiver; and (*d*) grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration and all such powers as to bringing or defending suits and for the realization, management, protection, preservation and improvement of the property the collection of the rents and profits thereof the application and disposal of such rents and profits and the execution of instruments in writing as the owner himself has or such of those powers as the Court thinks fit. But nothing in this section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit or some or one of them have or has not a present right so to remove. Section 504.

Where the property is land-paying revenue to the Government, or land of which the revenue has been assigned or redeemed and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may appoint the Collector to be receiver of such property. Section 504.

The appointment in England can be made before the service of the writ.—*In H.'s Estate*, 1 Ch. D. 286.—*Colebourne* v. *Colebourne*, 1 Ch. D. 690; or after service and before appearance.—*Taylor* v. *Echersley*, 2 Ch. D. 302; or the application of the defendant at any time after judgment.—*Sargant* v. *Read*, 1 Ch. D. 600; and apparently on the application of either party after judgment.—*Salt* v. *Cooper*, 16 Ch. D. 544. It used to be supposed that the appointment of a receiver so far as it affected the rights of creditors did not take effect until he had completed his security.—*Edwards* v. *Edwards*, 2 Ch. D. 291, but this doctrine is now overruled and the appointment—at all events where it is made on final process—operates as a delivery in execution from the instant of its being made so as to render the judgment-creditor a secured creditor.—*E. P. Evans*, 18, Ch. D. 252, and even against a purchaser who completed his purchase in the time between the appointment of the receiver—and his going into possession.—*I. R. Pope*, 34 W. R. 354; *Salt* v. *Cooper*, 16 Ch. D. 544.

Right to proper trustees.

60. The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Explanation I.—The following are not proper persons within the meaning of this section :—

A person domiciled abroad : an alien enemy : a person having an interest inconsistent with that of the beneficiary : a person in insolvent circumstances ; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor.

Explanation II.—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

Illustrations.

(*a*) A, one of several beneficiaries, proves that B, the trustee, has improperly disposed of part of the trust-property, or that the pro-

perty is in danger from B's being in insolvent circumstances, or that he is incapacitated from acting as trustee. A may obtain a receiver of the trust-property.

(*b*) A bequeaths certain jewels to B in trust for C. B dies during A's lifetime; then A dies. C is entitled to have the property conveyed to a trustee for him.

(*c*) A conveys certain property to four trustees in trust for B. Three of the trustees die. B may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(*d*) A conveys certain property to three trustees in trust for B. All the trustees disclaim. B may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

(*e*) A, a trustee for B, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. B may institute a suit to have A removed and a new trustee appointed in his room.

Commentary.

A trustee may be removed who grossly misconducts himself by misapplying the revenues of the trust property purchasing the trust property renewing a lease for his own benefit absconding under a criminal charge or concurring in any breach of trust.—*Agnew*, 284. In an action to remove a trustee it is not irrelevant nor necessarily scandalous to impute corrupt motives or vindictive conduct in the administration of the trust. But it is impertinent and may be scandalous to state facts as evidence of general malice or personal possibility.—*Earl of Portsmouth* v. *Fellows*, 5 Mad. 450.

Right to compel to any act of duty.

61. The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

Illustrations.

(*a*) A contracts with B to pay him monthly Rs. 100 for the benefit of C. B writes and signs a letter declaring that he will hold in trust for C the money so to be paid. A fails to pay the money in accordance with his contract. C may compel B on a proper indemnity to allow C to sue on the contract in B's name.

(*b*) A is trustee of certain land, with a power to sell the same and pay the proceeds to B and C equally. A is about to make an im-

provident sale of the land, B may sue on behalf of himself and C for an injunction to restrain A from making the sale.

Commentary.

A trustee by the terms of a marriage settlement is bound to compel the payment of a sum of money due on covenant. By the consent of the beneficiary he allows it to remain outstanding. On a revocation of such consent, the trustee must without an indemnity from the beneficiary compel the payment.—*Kirby* v. *Mash*, 3 Y. & Col. Ex. 95.

The Specific Relief Act (I of 1877,) s. 54 empowers the Court to grant a perpetual injunction when the defendant is a trustee for the plaintiff and appends the following illustration: "A trustee threatens a breach of trust. His co-trustees, if any, should and the beneficial owners may sue for an injunction to prevent a breach of trust. Any one of the beneficiaries however small his interest and even an infant may sue."—*Dance* v. *Goldingham*, L.R., 9 Ch. 902.

An injunction to restrain a sale at an undervalue can be obtained from the Court.—*Dane* v. *Goldingham*, L. R., 8 Ch. App. 902. The doctrines relating to injunctions are concisely stated in Griffith's Institutes of Equity, pp. 247—253.

Code of Civil Procedure 1882, s. 492, enacts that "If in any suit it is proved by affidavit or otherwise (*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or (*b*) that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act or give such order for the purpose of staying and preventing the wasting, damaging alienation sale removal or disposition of the property as the Court thinks fit."

In similar grounds the Court will appoint a receiver and grant an injunction where the character of the trustee or the condition of the trust property renders it desirable.—*Everett* v. *Prythergch*, 12 Sim. 365. See Code of Civil Procedure, 1882, ss. 503, 505. By virtue of section 503, "Whenever it appears to the Court to be necessary for the realization, preservation, or better custody or management of any property moveable or immoveable the subject of a suit or under attachment, the Court may by order (*a*) appoint a receiver of such and if need be (*b*) remove the person in whose possession or custody the property may be from the possession or custody thereof; (*c*) commit the same to the custody or management of such receiver."

Where one set of trusts is in conflict with another set, a receiver may be appointed.—*Talbot* v. *Scott*, 4 K. & J. 139.

If a person commits a trespass on land in possession of a trustee and the latter refuses to bring an action, the beneficiary on giving an indemnity may compel the trustee to allow his name to be used in the action.—*Foley* v. *Burnell*, 1 B. C. C. 277.

Wrongful purchase by trustee.

62. Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (*a*) account for the nett profits of the property, (*b*) be charged with an occupation-rent, if he has been in actual possession of the property, and (*c*) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(*a*) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser; or

(*b*) entitles the beneficiary to have the property declared subject to the trust or transferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full

knowledge of the facts of the case and of his rights as against the trustee.

Commentary.

A subsequent ratification on adoption of what has been done in my name is in questions of agency and contract and for many purposes in actions of torts, considered by the common law equivalent to an assent to or command preceding the act ratified.—Coke on Littleton, 207*a*. The equity doctrines relating to confirmation have the same effect though confirmation frequently implies a certain acquiescence previously in the acts confirmed. A beneficiary who confirms cannot afterwards annul his confirmation on the sole ground that there was no adequate consideration. Such a party must be *sui juris* labouring under no absolute disability of infancy or coverture. In confirmation as in acquiescence a married woman in respect of her separate property not subject to a restraint against anticipation is competent to act. The ratification must be a solemn deliberate act, and where fraud has been practised, must be proved by the most conclusive evidence. The beneficiary must be honestly made acquainted by the material facts.—*Kempson* v. *Ashbee*, L. R., 10 Ch. App. 15. The cases differ as to whether ignorance of the law will vitiate a confirmation they are thus reconciled in Griffith's Institutes of Equity. "Law is an ambiguous word meaning both general law and a private right," page 82.

A conveyance of the property in pursuance of a covenant for further assurance in the original deed has been held not sufficiently distinct from and independent of the impeached transaction to ratify it.—*Wood* v. *Downes*, 18 Vesey, 120; *Roche* v. *O'Brien*, 1 B. & B. 330. Generally where an act is absolutely void a release is in effectual.—*Thomson* v. *Eastwood*, 2 App. Cas. 215.

63. Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

Following trust-property—into the hands of third persons;

Where the trustee has disposed of trust-property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary

into that into which it has been converted.

has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Illustrations.

(*a*) A, a trustee for B of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. B is entitled to the land.

(*b*) A, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust-money so misemployed.

Commentary.

Should a broker invest in a stock which was not within his authority and abscond, the unauthorized stock belongs to the trustee not to the bankruptcy assignee of the broker.—*Taylor* v. *Plumer*, 3 M. & S. 562. Should a factor sell goods consigned to him the prices of the money can be traced in bags, bills, notes or the factors banking account will go to his principal not to his creditors.—*Birt* v. *Birt*, L. R., 11 Ch. D. 772; *Patten* v. *Guardians of Edmonton*, 31 W. R., 785; *In re Hallett*, 13 Ch. D. 396. Where the trust fund has been so dealt with by mixture or otherwise that it cannot be identified or traced so as to establish a lien the beneficiary's right to follow the property necessarily ceases.—*Ryall* v. *Roll*, 1 Atk. 168; *E. P. Hardcastle*, 29 W. R. 615.

A banking company were employed as agents to collect money and to remit it to their employers. The bank received the money in cash placed it with the other cash of the bank and informed their employers that the money had been remitted, but before the money was actually remitted went into liquidation. FRY, J., held that the money was part of the general asset and that the employers of the bank were not entitled to be paid in priority to other creditors.—*West of England and South Wales District Bank*, 11 Ch. D. 772.

Notwithstanding the last cited decision it seems that as between a trustee and his beneficiary or a person standing in a fiduciary relation to another, such money might be followed.—*Rennell* v. *Duffell*, 4 D. M. & G. 372; *Birt* v. *Birt*, 11 Ch. D. 773*n* and *in re Hallett's Estate*, 13 Ch. D. 696, which was as follows: "If money held by a person in a fiduciary character though not as trustee has been paid by him to his account at his bankers the person for whom he paid it can follow it and has a charge on the balance in the banker's hand. —E. P. Dale & Co. dissented from. If a person who holds money as

a trustee or in a fiduciary character pays it to his account at his bankers and mixes it with his own money and afterwards draws out cheques in the ordinary manner. Held by the Court of Appeal dissentiente, THESIGER, L. J., that the rule in Clayton's case attributing the first drawings out to the first payments in does not apply and that the drawer must be taken to draw out his own money in preference to the trust money. As between two *cestuis que trust* whose money the trustee has paid into his own account at the bankers. Clayton's case applies. See also *New Zealand and Australian Land Company* v. *Ruston*, Q. B. D. 374; reversing the same case named *New Zealand and Australian Land Company* v. *Watson*, 5 Q. B. D. 474. Agents, Bailees, Collectors of rents are examples of persons in a fiduciary relation. An honest payment to a third person as to a tradesman in part discharge of his debt, to an auctioneer as a deposit afterwards forfeited for non-completion of the contract to a landlord as rent by an uncertificated bankrupt prevents the trust money being followed.—*Collins* v. *Stimson*, 11 Q. B. 142; *E. P. Dewhurst*, L. R. 7 Ch. App. 185. "In respect of raising a resulting trust there is no difference between a transfer and a purchase of stock."—Jessel, L. R. "That certainly is not the case with regard to a conveyance of land." JAMES, L. J.—*Fowkes* v. *Pascoe*, L. R. 10 Ch. App. 345.

A resulting trust only arises where there is no other explanation of the transaction. The endowment of a daughter is such an explanation and if she be married, a transfer into her name and that of her husband is equivalent to a transfer into the name of an unmarried daughter alone.—*Batstone* v. *Salter*, L. R., 10 Ch. App. 431. A resulting trust may prevail as to a life-interest when it is rebutted as to a remainder.—*Fowkes* v. *Pascoe*, L. R., 10 Ch. App. 343; *Standing* v. *Bowring*, 27 Ch. D. 341.

B for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers placed for their credit money which was to be held in trust for him. Some of the money was drawn out with B's consent and subsequently the company was ordered to be wound up. The Court of Appeal held that whether the money were a loan or a trust, though it might have been reclaimed by him before the order to wind up was made, it could not be afterwards.—*Great Berlin Steam Boat Company*, 26 Ch. D. 616.

Saving of rights of certain transferees.

64. Nothing in section sixty-three entitles the beneficiary to any right in respect of property in the hands of—

(*a*) a transferee in good faith for consideration without having notice of the trust, either when the

purchase-money was paid, or when the conveyance was executed, or—

(*b*) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.

Nothing in section sixty-three applies to money, currency notes and negotiable instruments in the hands of a *bonâ fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the liability of a person to whom a debt or charge is transferred.

Commentary.

The Indian Contract Act, 1872, s. 108, is penned as follows:—No seller can give to the buyer of goods a better title to those goods than he has himself except in the following cases:—

Exception 1.—When any person is by the consent of the owner in possession of any goods or of any bill of lading, dock warrant, warehouse keeper's certificates or warrant or order for delivery or other documents showing titles to goods, he may transfer the ownership of the goods of which he is in possession or to which such documents relate to any other person and give such person a good title thereto notwithstanding any instructions of the owner to the contrary. Provided that the buyer acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

The possession must be absolute, not qualified, 12 Bengal, 46.

Exception 2.—If one of several owners of goods has the sole possession of them by permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods had no right to sell them.

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person, who, before the contract is rescinded buys them in good faith of the

person in possession unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents. In this case the original owner is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contracts.

A purchaser for valuable consideration without notice is entitled to an order of Court that the title-deeds be delivered up to him.—*In re Cooper*, 20 Ch. D. 611. Under the English Acts registration is not of itself notice.—*Kettlewell* v. *Watson*, 26 Ch. D. 501.

"It cannot be denied that generally speaking a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor and will be affected with notice of what appears on the title if he do not so inquire; nor can it, I think, be disputed that this rule applies to the purchaser or mortgagee of a leasehold estate or that it applies equally to a tenant for a term of years, and I cannot see my way to hold that a rule which applies to all these cases ought not to be held to apply to the case of a tenant from year to year." TURNER, L. J.—*Wilson* v. *Hart*, L. R., 1 Ch. App. 467.

A mortgagee is a purchaser *pro tanto*.

What constitutes negligence of a mortgagee in not obtaining or parting with the title-deeds is discussed in *Northern Counties of England Fire Insurance Company* v. *Whipp*, 26 Ch. D. 492.

A vendee purchasing in good faith and without notice from a benamidar acquires a good title as against the true owner and his heirs or any subsequent purchaser from them.—*Bhugwan Doss* v. *Upooch Singh*, 10 W. R. 183.

Civil Procedure Act, 1882, s. 317. "No suit shall be maintained against the certified purchaser on the ground that the purchase were made on behalf of any other person or on behalf of some one through whom such other person claims."

Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser.—*Lokhee* v. *Kalypuddo*, L. R., 2 I. A. 154.

The holder of a certificate of administration under Act XXVII of 1860, is a trustee liable to account for the monies received by him to the legal heirs or representatives of the deceased.—*Biswas* v. *Biswas*, I. R., 8 C. S. 869.

The Government by directing the Court of Wards to take charge of an estate during the minority of the new claimants does not

constitute itself a trustee for the rightful owner. The wrongful invasion or continuance in possession of a stranger whether with or without knowledge of the infirmity of his title will not make the wrong-doer a constructive trustee unless he has been admitted into possession by a trustee. TURNER, J., JAMES, J., AYYAR, J.—*Zemindar* v. *Secretary of State for India*, I. R. 5 M. S. 91.

Acquisition by trustee of trust-property wrongfully converted.

65. Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

Right in case of blended property.

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Commentary.

A trustee who mixes his own property with that of the trust does so at the risk of losing his own should he be unable to distinguish the one from the other.—*Cook* v. *Addison*, L. R., 7 Eq. 466. The trustees of a settlement may safely pay to an executor the settled fund when the residue after certain legacies is given to him. Where instead of doing so they paid it into Court under a Trustee Relief Act, they were condemned to pay the costs.—*Hayes* v. *Oalby*, L. R. 14 Eq. 1 ; *In re Hoskin's Trusts*, 5 Ch. D. 229.

"The general wisdom of mankind has acquiesced in this that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must consent to have the effects of it recoil upon himself. This I say is a proposition which is supported by the Holy Scriptures by the authority of profane writers by the common law of this country and by the decisions in our own Courts of Equity." SHADWELL, V. C.—*Duke of Leeds* v. *Earl of Amherst*. Where a commission agent mixed his goods with those of his principal and destroyed his books of account he was disallowed his commission.—*Gray* v. *Haig*, 20 Beav. 219. The Indian law is more merciful than the English on this point or rather makes more allowances for the infirmities of individuals. In England the beneficiary is entitled to all that the trustee cannot prove to be his own. A bailee may take all the mixed goods. In the former case the

present section merely gives a lien for the beneficiary's property. In the latter the Indian Contract Act, s. 157 confines the remedy to compensation.

See Section 23*f*.

Wrongful employment by partner trustee of trust-property for partnership purposes.

67. If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations.

(*a*) A and B are partners. A dies, having bequeathed all his property to B in trust for Z, and appointed B his sole executor. B, instead of winding-up the affairs of the partnership, retains all the assets in the business. Z may compel him, as partner, to account for so much of the profits as are derived from A's share of the capital. B is also answerable to Z for the improper employment of A's assets.

(*b*) A, a trader, bequeaths his property to B in trust for C, appoints B his sole executor, and dies. B enters into partnership with X and Y in the same trade, and employs A's assets in the partnership-business. B gives an indemnity to X and Y against the claims of C. Here X and Y are jointly liable with B to C as having knowingly become parties to the breach of trust committed by B.

Commentary.

A trader appointed an executor who subsequently entered into partnership with some other persons in the same trade and employed the testator's assets in the partnership business. He gave them an indemnity against any claim by the residuary legatees. His partners were held liable jointly with the executor not as partners, but because they were knowingly parties to a breach of trust.—*Flockton* v. *Bunning*, L. R., 8 Ch. 323n; *Vyse* v. *Fostere*, L. R., 7 H. L. C. 318.

Seeing that one partner is an agent of the firm the rule is that "where a firm in the course of its business receives money belonging to other people and one of the partners misapplies that money whilst it is in the custody of the firm the firm must make it good."

Lindley, II, 1—4; Indian Contract Act, 1872, s. 50. The section last cited may at first sight appear to conflict with the section of the Indian Trusts Act. But it is to be remarked that the latter section contemplates cases where the money comes into the hands of the firm not in the ordinary course of business. It is also to be remarked that though possession constitutes a sufficient title against every person not having a better title (Plowden, 296) yet the beneficiary has such better title as will enable him to follow his own money into the hands of the firm and demand it back specifically if he can show that the firm has still possession thereof specifically, and did not obtain it by purchase for value without notice. "His right is incidental to his ownership and whether the money is traced to the hands of a single individual or to the hands of a firm is wholly immaterial."—Lindley, II, 1—4,—*Brown* v. *Adams*, L. R., 4 Ch. 764.

Liability of beneficiary joining in breach of trust.

68. Where one of several beneficiaries—

(*a*) joins in committing breach of trust, or

(*b*) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries or

(*c*) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or

(*d*) has deceived the trustee and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial

interest nothing in this section applies to such property during her marriage.

Commentary.

In some cases the beneficiary's interest may be impounded by the trustee. A life-tenant instigated an improper investment whereby his income was increased. A trustee primarily liable was held entitled to be indemnified as against the said beneficiary or his estate to the extent of the benefit derived from the impropriety of the investment.—*Raby* v. *Ridehalgh*, 7 D. M. & G. 109.

The general rule is that married women subject to the Succession Act may deal with their property as if unmarried.—Act X of 1865, s. 4.

Rights and liabilities of beneficiary's transferee.

69. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

See note to section 58.

CHAPTER VII.

Of Vacating the Office of Trustee.

Office how vacated.

70. The office of a trustee is vacated by his death or by his discharge from his office.

Commentary.

The English Conveyancing Act, 1881, *44 & 45 Vic., c. 81, s. 41*, creates another mode of vacating the office which amongst honest trustees is useful. "Where there are more than two trustees, if one of them declare that he is desirous of being discharged from the trust and if his co-trustees and such other person if any as is empowered to appoint trustees by deed consent to the discharge of the trustee and to the vesting in the co-trustee alone of the trust property then the trustee, desirous of being discharged, shall be deemed to have retired from the trust and shall by the deed be discharged therefrom under the Act without any new trustee being appointed in his place.

Discharge of trustee.

71. A trustee may be discharged from his office only as follows:—

(*a*) by the extinction of the trust;

(*b*) by the completion of his duties under the trust;

(*c*) by such means as may be prescribed by the instrument of trust;

(*d*) by appointment under this Act of a new trustee in his place;

(*e*) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or

(*f*) by the Court to which a petition for his discharge is presented under this Act.

Petition to be discharged from trust.

72. Notwithstanding the provisions of section eleven, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

Appointment of new trustees on death, &c.

73. Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from British India, or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable

to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(*a*) the person nominated for that purpose by the instrument of trust (if any,) or

(*b*) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The official trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

Commentary.

The power of appointing new trustees given by Lord CRANWORTH'S Act in England authorized a retiring trustee one of two originally appointed to appoint a single trustee in place of himself, the other trustee having previously disclaimed without acting.—*West of England and South Wales District Bank* v. *Mirch*, L. R., 23 C. D. 138.

The appointment of tutors or trustees of minors under the French law is usually made by a family council. Such a method

it is thought would be of great use both amongst the Hindoos and Mahommedans. Krishna Kamal Bhattacharyya writes : (Tagore Law Lectures, 1884—1885, p. 223) "If the senior member be unfit or unwilling" to be manager of a joint Hindu family, "then something like an informal consultation is held among the co-parceners and the member who in the estimation of all stands as a capable person is nominated to the headship." Syed Ameer Ali (Tagore Law Lectures, 1884, p. 255) writes : "As long, as there is a relative of the wâkif in existence, a stranger should not be appointed mutwalli for a relative is more benevolently disposed towards the wâkif and it is generally the intention of the wâkif that a relative should be appointed provided he is qualified for the office."—9 B. H. C. Rep. 19—Radd ul-Muhtar III, 636.

The French law respecting family councils is contained in the Code Civil livre i.' Titre x, section iv, § 405—419. De la Tutelle déférée par le Conseil de famille.

405. Lorsqu' un enfant mineur et non emancipé restera sans pere ni pere ni mere ni tuteur elu par ses pere et mere niascendans males comme arssi lorsque le tuteur de l une des qualites cu dessus exprimées se bronvera on dans le eas des exclusions dont il sera parts ciapres on valablement excuse il sera pourvus par um conseil de famille a la nomination d'un tuteur.

406. Ce conseil sera convoqué sort sur la requisition et a la diligeme des parens du mineur de ses oreanuers on d'antres parties interessées soit meme d office et a la poursuite du juge de pain du domicile du nuneur. Toute personne pourræ denoncer a ce juge de paix la fait qui donnera lien a la nomination d'un tuteur.

407. Le conseil de famille sera composé non compris le juge de pain de six parens on allies pristant dans le commune ou la tu telle sera onverti que dans le dislame de deun myriametres mortié du coté paternel moitié du cote maternel et en suivant l ordie de pronimite dans chque ligne. Le parens sera prefere a lallie du meme degre le plusage a celui qui le sera le moins.

408. Les preres germains du mineur et les moris des sœ germaines sont seuls exceptes de la limitation de nombre posée eml' artule precedent. Sils sout sin om am dela ils seront tous membres du conseil de famille qu ils composeront seuls aver les veuves d ascendants et les ascendants valablement excuses s'il yena. Sils sout en nombre inferieurs les antres parens ne seront appelés.que pour compleler le conseil.

409. Lorsque les parens on alliés de lune on de l'antre ligne se trouveront en nombre insuffisant sur les lieux ou dans la distance

designee par l article 407 le juge de pain appellera sort des parens on alliés domiciliés a de plus grandes distances soit dans le commun meme descitoyens connus pour avoir en des relations habituelles d amitie avee le pere en la mere du mineur, &c.

Appointment by Court.

74. Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under section seventy-three, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee, or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

Rule for selecting new trustees.

In appointing new trustees, the Court shall have regard (*a*) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust; (*b*) to the wishes of the person, if any, empowered to appoint new trustees; (*c*) to the question whether the appointment will promote or impede the execution of the trust, and (*d*) where there are more beneficiaries than one, to the interests of all such beneficiaries.

Commentary.

This section embodies the principles laid down.—*In re Tempest*, L. R., 1 Ch. 485.

It is presumed that the Court can sever a trust and appoint a trustee or trustees for a separate part only.—*Cooper* v. *Todd*, 29 W. R. 502. In England the Conveyancing Act, 1882, s. 5, gives the parties to appoint without the aid of the Court, on an appointment of new trustees, a separate set of trustees for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or if only one trustee was originally appointed then to appoint one trustee for the first mentioned part.

Vesting of trust-property in new trustees.

75. Whenever any new trustee is appointed under section seventy-three or section seventy-four, all the trust property for the time being vested in the surviving

or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees, or trustee as the case may require.

Powers of new trustees.

Every new trustee so appointed, and every trustee appointed by a Court either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Commentary.

Such legislative conveyance of the trust property is as regards expense efficacy and promptness a great improvement upon the conveyance by a vesting order under Act XXVII of 1866, s. 36.

New trustees are not bound to make enquiries of the old trustees as to notices received by them of incumbrances made by the beneficiaries. JAMES, L. J.—*Phipps* v. *Lovegrove*, L. R., 16 Eq. 80.

Survival of trust.

76. On the death or discharge of one of several co-trustees, the trust survives and the trust property passes to the others, unless the instrument of trust expressly declares otherwise.

Commentary.

A bare authority committed to several persons is determined by the death of any one ; if coupled with an interest it passes to the survivor or survivors. Trustees taking the trust estate as joint tenants the estate office and power of a trustee would survive to a fellow.—*Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 108.

A power of appointing new trustees is not an express declaration, preventing survival.—*Foley* v. *Woutner*, 2 J. & W. 245.

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

This chapter is much less comprehensive than the other chapters of this most important Act. We therefore extract from the Systema Machelde, s. 185a and s. 185b, a more complete statement of the

methods of extinguishing legal rights whether trust or other. The last of them Limitation or Prescription will require illustration by cases seeing that it rests on the words of a positive law.

Jura semel acquisita tamdin durant donee existit causa que eorum erstinctio efficitur causa ejusinodi posita esse potest, (A) in voluntate ejus cui jus competit. Haque jura extinguuntur (1) renuntiatione quœ est voluntaria juris abcujus abdicatio ita facta ut hoc jus in aliam personam non transferatur. Ad quamcunque renuntiationem requiritur ul renuntiante jus re vera compelat is que bene noverit rem cui renuntiaturus est. (2) Alienatione sub qua sensu lato intelligitur quælibet mutatio quam arse jura nostra suscipinius itaque non solum juris abcujus translated in alterum sed eliam jurium resignatio servitutes et pignoris constitutio nex non solutionis acceptatio. (*b*) Invites varus ex causis jus quoddan amittere possumus. Harum causarum me commemoremus modo universe has; (1) jura quœ ex statu descendunt exstinguisntior amisso statu; (2) jura realia interitus rei; (3) jura personalia obligatione quoquo modo sublata. Porro jura realia æque ac personalia exstinguisntur; (4) si is qui jus reale in alterum transtulit ab initio jus temporarium et revocabile modo in rem habuit, hoc ipso exstincto; vel si ei qui alteri jus concedebat propter speciales causas postee incidentes jus revorandi obvenit subsecuta revoiatidue; (5) existente conditione resolution vel termino ad quem sub quibus jus concessum est; (6) si cui ob abusum vel propter aliud delictum jussivem abjudication; denique prœscriptione extinction.

Trust how extinguished.

77. A trust is extinguished—

(*a*) when its purpose is completely fulfilled; or

(*b*) when its purpose becomes unlawful; or

(*c*) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or

(*d*) when the trust, being revocable, is expressly revoked.

Commentary.

(*a*) The duties of an executor are extinguished when he has duly paid all the debts and legacies without mistake.

(*b*) Previous to performing a marriage ceremonial with a deceased wife's sister the husband settled property on trust for himself till marriage then for his intended wife for children of the former mar-

riage and for children of the intended marriage. The second marriage being void all the trusts subsequent to the first were ineffectual.—*Pawson* v. *Brown*, L. R., 13 Ch. D. 202.

The Indian Limitation Act, 1877, Act XV, provides that no suit against an express trustee or his legal representatives or assigns shall be barred by any length of time, section 10; that suits to make good loss caused by the breach of trust of a person, deceased, for contribution against the estate of a deceased person against the purchaser of moveable property from a trustee and against the purchaser of land from a trustee may be barred. Schedule II, Articles 98, 100, 133, 134. The words of section 10 are—"No suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for a valuable consideration) for the purpose of following in his or their hands, such property shall be barred by any lapse of time." Such is the general doctrine of the English law.—*Chalmer* v. *Bradley*, 1 Jac. & W. 51; *Bonney* v. *Ridgard*, 1 Con. 145; *Beckford* v. *Wade*, 17 Ves. 97. But laches and contributory wrong may disentitle to relief.—Griffith's Institutes of Equity, p. 26, Maxim xvi, and *Brice* v. *Stokes*, 11 Vesey, 319.

No suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration for the purpose of following in his or their hands, such property shall be barred by any length of time.—Limitation Act, 1877, s. 10.

Section 10 has reference to express trustees. In order to make an express trustee within the meaning of the section it must appear either from express words or clearly from the facts that the rightful owner has entrusted the property to the person alleged to be a trustee for the discharge of a particular obligation.—*Barkat* v. *Dowlat*, I. R. 4 A. S. 187.

In *Bakwant Rao* v. *Puran Mal*, I. R. 6 A. S. 1. The Privy Council, A.D. 1884, held that a suit in order to fall within Act IX of 1871, s. 10, excepting suits against trustees from limitation must be brought for the purpose of recovering the trust property for the benefit of the trust, that section meaning that when trust property is used for some purpose other than that of the trust it may be recovered without any bar of time from the hands of those in whom it has been vested in trust.

Where the plaintiff sued to enforce his own personal right. "All reference to the Limitation Act." Act IX of 1871 are to be read as if made to the Act XV of 1877.

A suit to fall within Act IX of 1871, s. 10 excepting suits against trustees from limitation must be brought for the purpose of recovering the trust property for the benefit of the trust; and not for that

of enforcing a personal right.—*Balwant Rao* v. *Puran Mal P. C.* I. L. R., 6 A. S. 1.

M and S purchased certain property jointly, in 1865, and had equal interests in it till 1868 when M's interest was reduced to one-third, S paid the entire purchase-money in the first instance and incurred expenses in conducting suits for the possession of the property and for registration of the deed and ultimately obtained possession in 1869 or 1870 and took the profits from that date. M did not pay any part of the money up to 1870, and it was till 1871 that the whole of his share was subscribed, and he paid little or nothing towards the expenses. Subsequently he sued S for possession of his share to have an account taken of the profits and to recover his share of them with future mesne profits and costs. OLDFIELD and DUTHOIT, J.J., held that under the above circumstances there was a resulting trust in favour of the plaintiff and the defendant became liable to account to him for his share; but inasmuch as there was no express trust and the property did not become vested in a trust for a specific purpose within the meaning of section 10 of the Limitation Act, and the suit was not brought for the purpose of following such trust property in the hands of a trustee within the meaning of the section; such suit was not one which under section 10 might not be barred by any length of time. They also held that No. 89 of Schedule II of the Limitation Act did not apply to the suit and that No. 62 did not meet a claim like the present relating to an equitable claim against a trustee liable to account in which the relief sought was to have an account taken of the trust property and to recover what might be due. They held also that No. 120 of Schedule II of the Limitation Act applied to the suit as it was one for which no period of limitation was provided elsewhere in the schedule.—*Muhammad Habibullah Khan* v. *Safdar Husain Khan*, I. L. R., 7 A. S. 25. The presumption of Hindu law is that a person survives for twelve years from the receipt of the last intelligence respecting him. This presumption is rebuttable and when there is a reasonable doubt of death having happened, the trustee should still accumulate the funds. In most cases it will be prudent to obtain an indemnity from the person to whom he pays them over.—*E. P. Norris*, L. R. 4 Ch. 287. Ignorance of facts may excuse trustees without a release from making improper payments.

A. D. 1813, S being unable to pay the Government revenue due on his land abandoned his village. A.D. 1813, H who had paid the revenue due by S and had taken or obtained from the Government possession of S's land attested a village paper in which it was stated that if S returned and reimbursed him, he should be entitled to his land. Sixty years after S abandoned his village, B as his representative sued the representative of S for such land alleging that it had vested in H in trust to surrender it to S or his heirs on demand.

As evidence of such trust B relied on the village paper mentioned above and on the village administration paper of 1862 in which it was stated that absent co-sharers might recover their shares on payment of the arrears of Government revenue. OLDFIELD and TYRRELL, J.J. held that the documents did not prove an express trust which Act XV of 1877 exempts from Limitation.—*Barkat* v. *Dowlat*, I. L. R. 4 A. S. 187.

A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property and for an account is a suit to follow property and as such is not barred by lapse of time. WILSON, J.—*Huro Comaree Dossee* v. *Tarini Churn Bysack*, I. L. R., 8 C. S. 766.

A claim to vindicate the personal right of a trustee to the possession of immovable property against another person claiming that right in the same character is not governed by section 10 of the Limitation Act.—*Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chanbe*, L. R., 10 I. A. 90; followed by TURNER, C. J. in *Karimshah A. and Nattan Bivi*, I. L. R., 7 M. S. 417, also in *Kannan A.* v. *Nilakandan R.*, I. L. R., 7 M. S. 737. But the last decision is questionable.

A person whose interest is reversionary and cannot sue before it falls into possession seems incapable of laches until that period.—*Taylor* v. *Cartwright*, L. R., 14 Eq. 176.

A person purchased from one of the two co-trustees of a temple the right to manage the affairs of the temple and enjoy certain lands which formed the endowment of the temple and held possession of the land for more than twelve years. TURNER, C. J. and KERNAN, J., held that a suit by the other trustee to recover the land was barred by limitation.—*Kannar P. Nilakandan R.*, I. R., 7 M. S. 337.

A claim to vindicate the personal right of a trustee to the possession of immovable property against another person claiming that right in the same character is not governed by section 10 of the Limitation Act, 1877.—*Balwant Rao Bishwant Chandra Char* v. *Purun Mal Chanbe*, L. R., 10 I. A. 90, followed *Karimshah A. Nattan Bivi R.* I. R., 7 M. S. 417.

B having been sentenced to transportation for life presented a petition in a Revenue Court in which stating that he owned a certain zamindari estate, that he had been so sentenced and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the register and that of P recorded in its stead. P sold the property for consideration, his vendee purchasing without notice of any trust and it was subsequently put up for sale in execution of a decree against P's vendee and was purchased without notice of any trust. STUART, C. J. and STRAIGHT, J., held (1) that the transfer of the property by B to P was in the nature of a trust;

(2) that the property could not be followed into the hands of the purchaser at the execution sale.—*Hait Ram* v. *Durga Prasad*, I. R., 5 A. S. 608.

A being at the time unmarried executed a voluntary settlement by which he created trusts for himself for life and after his death for his issue and widows, if any, with ultimate trusts over. The deed contained a provision empowering A at any time with the consent of the trustee to revoke the trusts and to declare any new or other trusts. These being an infant beneficiary at the time the settlor sought to revoke the trusts. CUNNINGHAM, J., held that the official, trustee did rightly in withholding his consent.—*Bell* v. *Cureton*, 2 M. & N. 503, was followed; *Yasseim* v. *Official Trustee of Bengal*, I. R., 8 C. S. 890.

A trustee alleging that the trust property consisting of land was his own property mortgaged it. The mortgagee took the mortgage in good faith for valuable consideration and without notice of the trusts. The mortgagee obtained a decree against the trustee for the sale of the land and the land was sold in execution of the decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust-property, and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties. STRAIGHT, J. and BRODHURST, J., held that the plaintiff was estopped by his conduct from recovering possession of the land.—*Gulzar Ali* v. *Fida Ali*, I. R., A. S. 6, p. 24.

Revocation of trust.

78. A trust created by will may be revoked at the pleasure of the testator.

A trust otherwise created can be revoked only—

(*a*) where all the beneficiaries are competent to contract—by their consent;

(*b*) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust; or

(*c*) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

Illustration.

A conveys property to B in trust to sell the same and pay out of the proceeds the claims of A's creditors. A reserves no power of revocation. If no communication has been made to the creditors, A may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

Revocation not to defeat what trustees have duly done.

79. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Where obligation in nature of trust is created.

80. An obligation in the nature of a trust is created in the following cases.

Commentary.

Constructive Trusts.

A constructive trust is one which owes its origin to Equity, and does not depend on the intention of parties, express or implied. It arises when benefit or advantage is gained, even legally, which cannot be retained conscientiously, or so retained without paying its price.

It is a præsumptio juris et de jure that is not rebuttable by evidence, though its enforcement may be barred by intervening equities. Thus,

I. Any creditor of a deceased person, whose property has been transferred to legatees or distributees under the Statute of Distribution before payment of the debt, may recover from the transferee or transferees assets to the amount of the debt. This principle has been adopted by the Legislature in 22 & 23 Vict., c. 35, ss. 27—29. An executor is trustee of a debt due from himself though barred at law, and the heir of an unforeclosed mortgagage in fee is trustee for those entitled to the personal estate.

II. Where a person purchases or advances money on property, having at the time actual or constructive notice that a third person already has a prior right to or over the property, such prior right carries with it in Equity priority of remedy. A disregard of notice which is actual, not resting on rumour nor the statements of strangers, but coming from the person interested, is not to be distinguished from positive fraud. Constructive notice, however, creates a constructive trust properly so called.

Whenever, in the investigation of title or otherwise, recitals in deeds or other circumstances exist which ought to have put the person on inquiry, and which would have led to the discovery of another's interest, Equity considers the person neglecting to make the inquiry bound by the other's interest.

Thus neglect to call for title-deeds may give an equitable mortgagee, or other person holding the same, priority, though production

of documents, without an opportunity of examining them, may not (*a*).

A condition not to call for the lessor's title fixes with notice of the same (*b*).

Information of a partial restriction is constructive notice of the whole covenant (*c*)

A *lis pendens* creating an incumbrance is constructive notice.

Actual notice to counsel, attorneys or agents is constructive notice. Though this must be in hostile cases, not in mere options for purchase (*d*). How far a person is bound by the moral or legal fraud of his agent is both at law and in equity an unsettled question.

A purchaser for valuable consideration without notice is not bound by notice to his vendor. The same principle holds with respect to mortgages (*e*).

The effect of the County and Irish Registration Acts calls for observation.—*Le Neve* v. *Le Neve*, decided that where lands in a register county were settled by a deed which was not registered, and on a subsequent marriage with notice of the former settlement, settled by a deed which was registered pursuant to 7 Anne, c. 20, the former settlement should prevail. Owing to this decision of Lord HARDWICKE's the Registration Acts do not protect against actual notice. They still, however, have some effect and protect against constructive notice; and further, to search the register is itself constructive notice of all that such search ought to have discovered. See Indian Registration Act, 1877, ss. 17 and 49.

III. Under contracts of sale, where possession of an estate is given to a purchaser before payment of the money, the vendor has a lien in equity on the land for such money. This equity prevails against persons coming in by act of law, as bankrupt assignees, even without notice. Not so if a valuable consideration has been paid. It may be relinquished, but the taking of additional security for the money is not conclusive evidence of relinquishment. When, however, the consideration of the conveyance is a covenant, the lien is considered not to be relinquished, but to have no existence.

On the other hand, the purchaser has his lien for money paid when the title is not satisfactorily established. In *Rose* v. *Watson* (*f*), in the House of Lords, Lord Chancellor WESTBURY thus enunciated the law:—"When the owner of an estate contracts with the purchaser for the sale of it, or even for the immediate sale of it, the

(*a*) Brumfit *v.* Morton, V.-C. S., J. (57), 1198.
(*b*) Robson *v.* Flight, L. C. W., J. (65), 147.
(*c*) Wilson *v.* Hart, V.-C. W., J. (65), 730.
(*d*) Austin *v.* Tawney, 2 Ch. Ap. 147.
(*e*) Chadwick *v.* Turner, 1 Ch. Ap. 310.
(*f*) J. (64), 297.

ownership of the estate is in equity transferred by that contract. Where the contract is undoubtedly an executory contract in this sense, *viz.*, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance of the contract, executes it, and to the extent of the purchase money so paid does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate." . . . . "If that contract fails, and the failure is not to be attributed to any misconduct or default on the part of the purchaser, the question is a very obvious one: Is the purchaser to be deprived of the interest in the estate which he has acquired by that *bonâ fide* payment?" . . . . . "It only gives in point of fact an additional ground of complaint to the purchaser that he cannot obtain the estate he contracted for, and that being unable to obtain it by reason of the failure of the vendor, the loss to him is attempted to be aggravated by depriving him of the only means of acquiring the repayment of his money,—the vendor having become bankrupt, *viz.*, by following the interests which in respect of the payment of that money he had acquired in the estate." . . . . "It was money advanced on the faith that the land, the subject of the contract, would become the property of the respondent, and being so paid as part of the purchase-money, pursuant to the contract, I think that your Lordships will have little difficulty in ruling that these sums of money thus paid formed principal sums in respect of which a lien arose from the time of payment, in consequence of the subsequent failure of the vendor to perform the contract, and being a lien they bore fruit consequently, that is to say, they entitled the person who is possessed of the lien to interest in respect of them."

Mortgagees who advanced their money after the date of the contract were postponed.

IV. We have already called attention to wrongful alienations of trust property. Such alienations create constructive trusts as against alienees for valuable consideration with notice, and as against voluntary alienees with or without notice. Such trusts are also created where trustees make any profit, or where agents make any illicit profit in the trust or agency respectively committed to them.

V. In leaseholds for lives and in copyholds where a person renews or obtains admission on his own account, he will be a trustee for all jointly interested with him under the former settlement. Much of the life leasehold tenure property has changed its form under the management of the Ecclesiastical Commissioners.

In *Postlethwaite* v. *Lewthwaite* (*a*), lessees for lives under a lease from a Dean and Chapter, which it had been for a long series of years a custom to renew, granted an underlease of part of the property, with a covenant for renewal on certain terms as often as the

(*a*) J. (62), 791.

original lease should be renewed. The property of the Dean and Chapter passed to the Ecclesiastical Commissioners who refused to renew the original lease, but sold the reversion in fee to the lessees under and upon the terms of 14 & 15 Vict., c. 104. Upon a bill by the underlessee to enforce the renewal of his underlease, Vice-Chancellor WOOD held that underlessee's right to a renewal was gone, but that the reversioners were quasi trustees for him of the reversion purchased of the Ecclesiastical Commissioners, and bound to convey him the reversion in his portion of the property, on payment of a due proportion of the consideration given for the purchase of the property.

VI. A person lawfully in possession, though the title be defective and a joint owner, have each a lien for money laid out in repairs and reasonable improvements.

VII. If unmarried persons cohabit and have children, *primâ facie* the man is trustee of moneys placed by the woman in his hands (*a*).

A well known classification of the various species of frauds was made by HARDWICKE, L. C., in the leading cases of *Chesterfield* v *Jansen*, 2 Vesey, 123. First, then fraud which is *dolus malus* may be actual arising from facts and circumstance of imposition which is the plainest case. Secondly, it may be apparent from the extreme, see nature and subject of the bargain itself such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other which are inequitable and unconscientious bargains.

A third kind of fraud is that which may be presumed from the circumstances and condition of the parties contracting and which goes further than the rule of law which is that it must be proved and not presumed, but it is wisely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another which knowingly to do is equally against conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other.

A fourth kind of fraud may be collected or inferred in the consideration of the Court from the nature and circumstance of the transaction as being an imposition and deceit or other persons not parties to the fraudulent agreement. Examples of this last species of fraud are marriage brocage contracts; neither of the parties herein being deceived, but they tend necessarily to the deceit of one party to the marriage or of the parent or the friend. So where a creditor enter into a deed of composition with his creditors for 10s. in the pound or other rate, attended with a proviso that all other creditors executed this within a certain period, if the debtor privately agrees with one creditor to induce him to sign this deed, that he will pay or secure a greater sum in respect of his particular debt; in this case there can be no deceit on the debtor who is party thereto, but it tends to the

(*a*) James *v.* Holmes, J. (62), 553.

deceit of the other creditors who relied on an equal composition and did it out of compassion to the creditor. So °/o premiums contracted to be given for preferring or recommending to a public office or employment. Were a power of jointuring is executed in favour of a wife, but with an agreement that the wife should only receive part as an annuity for her own benefit and that the residue should be applied to the payment of the husband's debts it is a fraud upon the power, and the executed will be set aside except as to the good part, namely, the annuity. HENLEY, L. R.—*Aleyn* v. *Belitner*, 1 Eden. 132.

Where it does not appear that transferor intended to dispose of beneficial interest.

81. Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

Illustrations.

(*a*) A conveys land to B without consideration and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the land. B holds the land for the benefit of A.

(*b*) A conveys to B two fields, Y and Z, and declares a trust of Y, but says nothing about Z. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in Z. B holds Z for the benefit of A.

(*c*) A transfers certain stock belonging to him into the joint names of himself and B. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the stock during his life. A and B hold the stock for the benefit of A during his life.

(*d*) A makes a gift of certain land to his wife B. She takes the beneficial interest in the land free from any trust in favour of A, for it may be inferred from the circumstances that the gift was for B's benefit.

Commentary.

Implied Trusts.

The second class of trusts consists of what are called Implied Trusts. These depend on a presumed or implied intention. The

implication was unclaimed in claimed dividends under a deed resulted to the other creditors, though they had been paid some already.

Frequently it is necessary to distinguish a trust from a power, or a trust coupled with a power or a simple gift.

Where there is a power to appoint part of a settled fund, the execution of the power takes the part appointed entirely out of the settlement; although, therefore, the beneficial interest in it is not in terms immediately disposed of, yet there can be no resulting trust for the benefit of any person under the deed creating the power; for where the principal of a fund is appointed it must be considered as if it had never been comprised in the trust, because it is absolutely taken out of it by the execution of the power. Therefore, where a wife, under a settlement of her personal property, which was settled on herself and her husband and the survivor, and was afterwards to be laid out in land to be settled on the heirs of her body by him, remainder to the survivor in fee, had a general power to appoint 1,500*l.*, part of the money, and she did appoint it to a trustee, to pay to her nieces 1,500*l.* and 500*l.* respectively when twenty-one or at marriage; it was held, that the sum was wholly taken out of the settlement, and that there was no resulting trust, and the trustee having the whole capital money in his hands for the benefit of the *cestuis que trust*, the capital would draw the interest with it" (*a*).

The above doctrine is important with reference to succession and legacy duty (*b*).

The Court cannot execute a power where the donee declines to do so (*c*). But in laying down this broad rule we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. "Powers," as Chief Justice WILMOT observed, "are never imperative (*d*). They leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, Equity, on the general rule that the trust is the land, will carry the trust into execution at the expense of the remain-

(*a*) Sugden's Powers, 8th ed., p. 467.
(*b*) A.-G. *v.* Brackenbury, J. (63), 257.
(*c*) Sugden's Powers, ch. xi. s. 6, 8th ed., p. 588.
(*d*) A.-G. *v.* Lady Downing, Wilmot, 23.

derman, and without any regard to the person in whose favour it is to be executed being a mere volunteer, and not a purchaser, creditor, wife or child. This is the case where a power is given by a will to trustees to sell an estate and apply the money upon trusts. The power is in the nature of a trust. The legal estate, until the execution of the power, of course descends to the heir at law, and if the power be defeated at law by the death of the person to whom it was given, the legal estate would remain in the heir at law for his own benefit; but Equity, acting upon the trust, will compel the heir to join in the sale of the estate for the purposes designated by the testator.

On the other hand, the discretion to be exercised in the execution of a power must be distinguished from the bare trust: *e.g.*, a testator devised real estate to trustees, and gave them a power of granting leases for the term of twenty-one years. The trustees disclaimed the trust, and the heir at law, who was tenant for life of a moiety, granted a lease: Lord Chancellor WESTBURY held, that the lease was invalid (*a*).

In *King* v. *Denison*, Lord ELDON pointed out the distinction between gifts by will *upon* trusts, and gifts by will *subject* to trusts (*b*). "If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more, and the effect of those two modes admits just this difference: The former is the devise of an estate of inheritance for the purpose of giving the devisee the beneficial estate subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest."

The analogy holds with respect to personal estate (*c*).

In analogy with the maxim, that what is agreed to be done shall be considered as done in respect of consequences, SEWELL, M. R., held, that what was directed by a testator to be done should be considered as done, and that real estate ordered to be sold should be considered as personalty, and go accordingly; but where the purpose of conversion fails, the Court will consider the conversion as not ordered, and accordingly THURLOW, L. C., held, that as the heir cannot be disinherited, except by necessary implication, undisposed of personalty arising from realty reverted to him (*d*). In *Cogan* v.

(*a*) Robson *v.* Flight, J. (65), 147.
(*b*) 1 P. & B. 260; cited Clarke v. Hilton, by V.-C. S., 2 E. C. 810.
(*c*) Clarke *v.* Hilton, supra.
(*d*) Ackroyd *v.* Smithson, 1 Br. C. C. 503; cf Fletcher v. Ashburner, 1 Br. C. C. 497.

Stevens (*a*), where a gift of a sum of money was directed to be laid out in land for charitable purposes, and so was void as contravening the Mortmain laws, the analogous rule was acted upon in favour of the next of kin. This case was recognised in *Hereford* v. *Ravenhill* (*b*).

The failure of a devise or bequest in respect of the purposes of conversion is to be distinguished from a general failure of a devise or bequest, which is now governed by the Wills Act. Thus by 7 Will. IV. & 1 Vict., c. 26, s. 25, it is enacted, "That unless a contrary intention shall appear by the will such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the life-time of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will." See Indian Succession Act, 1865, s. 90.

A residuary bequest of personalty possesses such a scope, independently of the Act.

Implied trusts may also arise where a purchase is made by one person in the name of another. Where the nominee is a stranger, Equity presumes that the man who pays the money intends to reap the benefit, and in accordance with such intention creates a trust in his favour; where the nominee is a child or wife no such presumption exists, and accordingly no trust is created. The analogy which EYRE, B., in *Dyer* v. *Dyer* (*c*), draws between such a trust and the use which results to a person who enfeoffs another without consideration scarcely seems to hold, for in one case the legal estate was in the *cestui que* use, while in the other it never was in the *cestui que trust*. The analogy only holds so far as it holds with all cases of trust, *viz.*, to show that express and implied trusts, as well as uses, depend on intention of the parties.

Such intention may be shown, either by parol or by written evidence, according to the nature of the transaction. Formerly, in all cases of trust, whether express or implied, whether as to personalty or realty, Equity was satisfied with parol evidence of the intention of the parties. The Statute of Frauds introduced a new regulation, and required that trusts concerning land should be evidenced by writing, except when such trusts arose by implication or construction of law.

(*a*) Lewin, App. III.
(*b*) 1 Beav. 481.
(*c*) 2 Cox. 92.

Parol evidence is therefore still sufficient to prove the circumstances from which Equity will create an implied or constructive trust in all cases where such a trust might have been created before the passing of the Statute of Frauds.

The doctrine which the Court of Chancery has invented in order to give to a child or wife an estate which is purchased in his or her name is called Advancement. The presumption in favour of the child, founded on natural affection and moral obligation, is balanced against the interest of the individual, and is looked upon merely as a circumstance of evidence to rebut the presumption founded on such interest. Being a mere circumstance of evidence, it was frittered away by other circumstances nicely refined, till in the case of *Dyer* v. *Dyer*, Chief Baron EYRE laid down the rule "that the son was to be taken as a purchaser for a valuable consideration, in order that all matters of presumption in rebuttal of the son's claim might be avoided."

This rule obviated many difficulties, but does not appear to be based on solid grounds, for if such purchase is a circumstance of evidence to rebut the trust, resulting in favour of the parent, it ought in Equity, like all other circumstances of evidence, to admit of being itself rebutted. Accordingly we find that the rule works inharmoniously with other rules of law. Thus we find it laid down, that if land be purchased in the joint names of father and son, the son, if he survives, will have the whole fee by the common law rule of the jus accrescendi, but if the son die first, there will be a resulting trust to the father, whereas the common law rule would give the father the son's moiety by the jus accrescendi.

When the purchase is made in the name of a son and a stranger, this want of harmony is not discernible; for the son, if he survives the stranger, takes the whole beneficially, and the stranger, if he survives the son, becomes trustee of the whole for the father.

The doctrine of advancement obtains, in the case of persons placing themselves in loco-parentis. A person is considered to be in loco-parentis is when he means to assume any office which a parent might perform (*a*).

In cases where at Common Law there is a joint tenancy, Equity if possible, presumes a tenancy in common.

Thus where a conveyance is taken by the purchasers to themselves and their heirs, but the purchasers advance unequal portions of the

(*a*) Ex parte Pye, 18 Vesey, 140.

purchase-money, Equity will look upon the transaction as creating a tenancy in common.

In the case of trustees the jus accrescendi is an advantage; accordingly Equity looks upon trustees as joint tenants.

Where a purchase is made for trading purposes by partners, they will be presumed to be tenants in common.

Mortgages differ from purchases in that the money payment in the former is a loan, and not the price. A different rule accordingly obtains in Equity, where the money is advanced by two or more mortgagees, to what obtains at Common Law; and Equity, considering the conveyance as a mere security, holds that the mortgagees are tenants in common, and not joint tenants, whether the sums advanced be equal or unequal. Since no survivorship will arise of itself, it is usually deemed convenient to insert a clause to the effect that the receipt of the survivor shall be a valid discharge.

Jus accrescendi inter mercatores locum non habet is a rule of the Common Law as well as of Equity, though fully carried out in Equity alone.

Where a creditor's trust-deed contained no provision for redistribution of unclaimed dividends and a suit was brought by the representatives of one of the creditor's parties to the deed for the administration and distribution of funds in the defendant's possession allotted to other creditors by way of dividends but unclaimed by them for forty years. KERNAN, J., held, that the plaintiff was not entitled such dividends having by being set apart to the names, become the property of the creditors named. *Semble*, that as the trust sought to be established in favor of the plaintiffs would be a resulting trust not expressly declared. Section 10 of the Limitation Act, 1877 would not apply.—*Manickavelu Mudali* v. *Arbuthnot and Company*, I. L. R., 4 M. S. 404.

Though a creditor's deed fix a time for the execution thereof, delay by any creditor in so doing who nevertheless acts in accordance with or acquiesces in it will be relieved against by equity, and he will be entitled at least to the coming advantages.—*In re Baber*, L. R., 10 Eq. 554.

Chief Justice WESTROPP observed, "Where there is a devise upon trusts which do not exhaust the property devised the mere conferring of a legacy or other benefit on the heir does not prevent their being a resulting trust of the residue for him unless there be other circumstances sufficiently strong to turn the scale in favour of the devise." "Even where there is an express intention to exclude the next-of-kin from the residue of the personalty on the

heir from the residue of realty, there must be a distinct devisee away from them, otherwise there will be a resulting trust in their favour." —*Lallubhai Bapubhai* v. *Mankuvarbai*, I. L. R., 2 Bom. 410.

Fowkes v. *Pascoe*, L. R., 10 Ch. 343 is an authority for the admission of parol evidence to rebut the legal presumption arising on an instrument *inter vivos* that the settlor did not intend to give the beneficial interest.

In addition to other property an annuity was given to a testator widow as long as she and her son should live together. The Court held that it did not terminate upon the son's death in her life-time. —*Sutcliffe* v. *Richardson*, L. R., 13 Eq. 606; see *Wilson* v. *Bell*, L. R., 4 Ch. 581, see also *Armstrong* v. *Armstrong*, L. R., 7 Eq. 518; *Lambe* v. *Eames*, L. R., 6 Ch. 597; *Macbeth* v. *Macbeth*, 14 L. R., Eq. 49.

Transfer to one for consideration paid by another.

82. Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, Section 317, or Act No. XI of 1859 (*to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency*), Section 36.

Commentary.

The English rule that a purchaser in the name of a son or wife *primâ facie* creates a trust for the relation does not obtain in India. There "the rule is well established that in all cases of benami the true criterion is to ascertain from whose funds the purchase money proceeded. Whether the nominal owner be a child or a stranger a purchase made with the money of another is *primâ facie* assumed to be made for the benefit of the other.—*D. D. Pandey* v. *Dibiah*, 3 Moore, I. A. 229.

The plaintiff, a widow, in the year 1880, caused a sum of £6,300 consolidated bank annuities to be transferred into the joint names of herself and the defendant her godson in whom she took great interest. This transfer was not made known to him. In 1882 being

80 years old, she married a second husband and soon afterwards applied to the defendant to retransfer the state into her own name alone: Held, upon the evidence that the transfer was originally made deliberately and not with a view to the creation of a trust and therefore that no retransfer could be ordered.—*Standing* v. *Bowring*, L. R., 27 Ch. D. 341.

A transfer of shares in a company to an infant son though amounting to an advancement will, on winding up, be repudiated by the Court and the father made a contributory,—*Weston's case*, L. R., 5 Ch. 614; *Richardson's case*, L. R., 19 Eq. 588.

Where a payment into a bank by a husband to his wife's account is shown by the evidence to have been on an agency account for the purpose of convenience and without any contract or intention to give the wife any interest in such money, it will be the property of the husband and not of the wife.—*Lloyd* v. *Pughe*, L. R., 8 Ch. App. 88; *Marshall* v. *Crutwell*, L. R., 20 Eq. 328.

An investment will not be held an advancement by a father where there is an immediate formal and unmistakeable act of taking possession on his behalf. For example, supposing a shop be purchased in a son's name, but the father immediately takes possession and puts his own name over the door.—*Stock* v. *McAvoy*, L. R., 15 Eq. 59. A notice to quit given by the father soon after the purchase is strong evidence against an advancement.—S. C.

Nominal purchaser of an estate is a trustee for the person who pays the money. Purchase by a husband or parent in the name or names of a wife and child creates a rebuttable trust for them.—Griffith's Institutes, pp. 57-59.

The use of extrinsic evidence to supplement and control documents of title is treated of by Mr. Griffith in the *Law Times*, vols. 61 and 62.

Should the father of a family advance to the trustees of a settlement a further sum upon their making a purchase of an estate, the advance is in most cases to be taken as for the benefit of all interested in the settlement.—*Curtess's Trusts*, L. R., 14 Eq. 217. A policy of insurance effected on the life of his son is presumed in the absence of other evidence to be for the benefit of the son.—*Worthington* v. *Curtis*, 1 Ch. D. 419; *Stock* v. *McAvoy*, L. R., 15 Eq. 59; *Marshall* v. *Crutwell*, L. R., 20 Eq. 328.

Where a husband makes an investment in the names of himself and wife and of a trustee for them the wife surviving is entitled absolutely, if he survives her, it reverts to the husband as joint-tenant with the wife. The addition of the name of a trustee of the marriage

settlement does not augment the settled fund, but leaves the advancement distinct therefrom.—*Eykyn's Trusts*, 6 Ch. D. 118.

The presumption of advancement does not arise in the case of a stepmother. But it is easier to prove a gift in the case of a widowed mother than in that of a stranger, JESSEL, M. R.—*Todd* v. *Moorhouse*, L. R., 19 Eq. 69; *Bennet* v. *Bennet*, 10 Ch. D. 474. The opinion of CAIRNS, L. C., seems to be that in the case of a widowed mother it is to be presumed.—*Batstone* v. *Salter*, L. R., 19 Eq. 250.

Parol evidence, that the circumstances of the asserted owner of the real estate were so mean that he could not have been the purchaser, is admissible in proof of a resulting trust.—*Willis* v. *Willis*, 2 Atk. 76; *Heard* v. *Pilley*, L. R., 4 Ch. App. 552.

Where there is an uncertainty as to what portion of an estate was purchased absolutely and what on trust, a reference will be made to ascertain the portions and relief accordingly be granted.—*Chattock* v. *Muller*, L. R., 8 Ch. D. 177.

C a trustee employed a broker who had notice of the trust to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the amount for settling day and received the price of consols in a cheque which he paid into his bank to his own account. He stopped payment before the settling day and went into liquidation. C claimed so much of the broker's balance as was attributable to the consols. Held (1) that as the price of the consols was known by the broker to be trust money it could be followed, and that the claim must be allowed, (2) that a part from the question of the trust, the position of a broker is not that of a banker but that of an agent into whose hands money is put to be dealt with in a particular way and therefore that it can be followed.—*I. R. Strachan*, 4 Ch. D. 123.

Receipt by the transferor of the income is not without more sufficient to rebut the intention alleged of conferring a beneficial interest on the transferees.—*Batstone* v. *Salter*, L. R., 10 Ch. App. 431.

Assuming a testatrix to know that she had made a gift by a transfer into joint names it would be extraordinary to suppose that subsequent similar transfers were for the purpose of converting the donee into a trustee. MELLISH, L. J.—L. R., 10 Ch. App. 354.

An express declaration of trust by parol upon a purchase in the names of strangers precludes a resulting trust for the Statute of Frauds while it saves resulting trusts does not in respect of them alter the former rules.—*Bellasis* v. *Compton*, 2 Vern. 294.

In *Gopeekrist* v. *Gungapersaud*, the Privy Council held not only that the English rule was not required by natural justice but in India there is what would make it particularly objectionable the impropriety or immorality of making an unequal division of property among children.—6 Moo. I. A. 53. The rule therefore not being one of positive law in India, the burden of proof is thrown on the party in whose name it was purchased to show that he was solely entitled to the legal and beneficial interest.—S. C.

The Mahomedan rule is similar to the Hindu.—S. C. and 5 B. L. R. 578.

It is a general rule of evidence that a tenant is estopped from disputing his landlord's title. But benami transactions in respect of leases form an exception though the person claiming benami is held to strict proof.—11 Moo. I. A. 28; 13 Moo. I. A. 393.

A conflict of evidence dating from 1852, respecting a benami transaction was ably discussed by Sir R. CROCH, in *Dharani Kant Lahari Chowdhry* v. *Kristo Kumari Chowdhrani*, L. R., 13 I. A. 70.

The title to Section 317 of the Code of Civil Procedure is "Bar to suit against purchaser buying benami." It is worded as follows: "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims." Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser.

Trust incapable of execution or executed without exhausting trust-property.

83. Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Illustrations.

(*a*) A conveys certain land to B—

"upon trust," and no trust is declared; or

"upon trust to be thereafter declared," and no such declaration is ever made; or

upon trusts that are too vague to be executed; or

upon trusts that become incapable of taking effect; or

"in trust for C," and C renounces his interest under the trust.

In each of these cases B holds the land for the benefit of A.

(*b*) A transfers Rs. 10,000 in the four per cents. to B, in trust to pay the interest annually accruing due to C for her life. A dies. Then C dies. B holds the fund for the benefit of A's legal representative.

(*c*) A conveys land to B upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. B sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. B holds the first moiety and the part unapplied of the second moiety for the benefit of A or his legal representative.

(*d*) A bequeaths Rs. 10,000 to B, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. B holds for the benefit of A's legal representative the undisposed of interest in the money or land if purchased.

Transfer for illegal purpose.

84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

See *Symes* v. *Hughes*, L. R., 9 Eq. 475.

Manning v. *Gill*, 13 Eq. 485; *Haigh* v. *Kaye*, 7 Ch. 469; *Dawson* v. *Small*, 13 Eq. 133.

Bequest for illegal purpose.

85. Where a testator bequeaths certain property upon trust and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest of which revocation is prevented by coercion.

Where property is bequeathed and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

Transfer pursuant to rescindable contract.

86. Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

Commentary.

"When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract unless he has signified by word or conduct his acquiescence in its continuance." The Indian Contract Act, 1872, No. IX, s. 39: "The rescission of a voidable contract may be communicated or revoked in the same manner and subject to the same rules as apply to the communication or revocation of a proposal.—IX, 1872, s. 66; see sections 3 and 5.

Rescission of contract is justifiable (1) on breach of warrant (2) when the contract was induced by fraud; (3) on non-performance of condition precedent.

(1) Breach of warranty. In the case of an executory contract as distinguished from the sale of a specific chattel, *e.g.*, where an article is ordered from a manufacturer who contracts that it shall be of a certain quality or fit for a certain purpose, the purchaser may either refuse to receive or he may return the article as soon as he debits its deficiency, and may thereby wholly defeat an action for the price provided he has done nothing more in the interim than was necessary to give it a fair trial. The plaintiff the vendor of certain seed warranted it good new growing seed. Soon after the sale, the defendant was told by a skilful person that it did not correspond with the warranty, but the defendant neither communicated this to the plaintiff nor returned the seed. On the contrary he sowed part and sold the residue to two persons. The seed would not grow and was unproductive, and the persons to whom the defendant had sold part refused to pay for the same: and it was held from the nature of the article and the warranty the buyer was entitled to try the seed by sowing it and that as no advantage had accrued from the seed, the plaintiff

could not recover any part of the price.—*Poulton* v. *Lallimore*, 9 B. & C. 259. The purchaser of a commodity which is to be afterwards delivered according to sample is not bound to receive the bulk or if it has been received, he may return it within a reasonable time if it be not agreeable to the sample.—*Street* v. *Blay*, 2 B. & Ad. 456.

An action for the breach of an express warranty may be brought without a previous offer to return the goods.

(3). The non-performance of a condition, precedent before any default by another party entitles the latter to consider himself freed from his liability to do the act which he agreed to perform after such condition, precedent should have been executed.—*Johnassohn* v. *Great Northern Railway*, 10 Ex. 434.

A defendant in October 1879 sold to the plaintiff, and the defendant bought of the plaintiff 2,000 tons of pig iron at 42*s*. a ton to be delivered to the plaintiff free on board at Maker's Wharf in November 1879, or equally over November, December and January next at 6*d*. per ton extra. The plaintiff failed to take delivery of any of the iron in November, but claimed to have one-third of the iron in December, and one-third in January. The defendant refused to deliver these two-thirds and gave notice that he considered the contract was cancelled by the plaintiff's breach to take any iron in November. Held, in an action by the plaintiff for damages in respect of the defendant's refusal that by the plaintiff's neglect to take one-third of the iron in November the defendant was justified in refusing to deliver the other two-thirds afterwards. Two of the Appellate Judges reversed the Judgment of the Queen's Bench based on *Hoare* v. *Rennie*, (5 H. & N. 19.) One upheld it.—*Houck* v. *Muller*, 7 Q. B. D. 92.

In rescission for fraud it is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind. Innocent misrepresentation or misapprehension is only a ground for rescission when it is such as to show a complete difference in substance between what was supposed to be and what was taken to be the consideration.

When a person binds himself or herself to do certain acts which they afterwards render themselves unable to perform the performance of conditions precedent to the act thereby rendered impossible as dispensed with.—*Horbster* v. *De La Tour*, 2 C. & B. 678.

The following proposition may also be deduced from the cases. "Where a contract is made with reference to certain anticipated circumstances, and where without any default of either party it

become wholly inapplicable to or impossible of application to such circumstances, it ceases to have any application.—*Appleby* v. *Myers*, L. R., 2 C. P. 651; *Jackson* v. *Union Marine Insurance Company*, L. R., 10 C. P. 125; *Howell* v. *Coupland*, L. R., 9 Q. B. D. 462.

Where the conduct of the vendor leads the purchaser to believe that he is purchasing one thing when in fact he is purchasing another he may rescind.—*Torrance* v. *Bolton*, L. R., 14 Eq. 124. In *Kennedy* v. *Panama Mail Company*, L. R., 2 Q. B. 580; *Redhead* v. *Midland R. Co.*, 4 Q. B. 379; *Richardson* v. *Great Eastern R. Co.*, 1 C. P. D. 342; *Francis* v. *Cockrell*, L. R., 5 Q. B. 184; *Searle* v. *Laverack*, 9 Q. B. 122; *Kopiloff* v. *Wilson*, 1 Q. B. D. 377.

"Any person interested in a contract in writing may sue to have it rescinded and such rescission may be adjudged by the Court in any of the following cases, namely:—

(*a*) where the contract is voidable or terminable by the plaintiff;

(*b*) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

(*c*) where a decree for specific performance of a contract for sale, or of a contract to take a lease has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered to him to pay."—Act I, 1877, s. 35.

"Rescission of a contract cannot be adjudged for mere mistake unless the party against whom it is adjudged can be restored to substantially to the same position as if the contract had not been made."

"A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that if it cannot be specifically performed, it may be rescinded." On adjudging the rescission the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.—Specific Relief Act, 1877, ss. 36—38.

"When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit so far as may be to the person from whom it was received." A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the Contract. —Act IX, 1872, ss. 64—75.

A suit for rescission of contract is not cognizable by Presidency Small Causes Courts.—Act XV, 1882, s. 19.

A person to whom money has been paid or any thing delivered by way of mistake, or under coercion must repay it.—Act IX, 1872, s. 72.

In *Urquhart* v. *Macpherson*, 3 A. C. 831, Sir MONTAGUE SMITH and other members of the Judicial Committee recognized the rule that contracts which may be impeached on the ground of fraud are not void but voidable at the option of the party who is or may be injured by the fraud subject to the condition that the other party of the contract be disaffirmed can be remitted to his former state." It is to be remarked that such a condition does not hold in all cases.

A contract induced by fraud cannot be avoided so as to violate the rights of a third innocent party.—*Balroch* v. *Lawson*, 4 Q. B. D. 400.

The rules as to specific performance are concisely declared in the Specific Relief Act, 1877, Chapter II. The accompanying extract from Griffith's Institutes of Equity explains the principles of these rules and illustrates the working thereof in practice :—

CONTRACTS.

The doctrines of the Common Law pertaining to contracts obtain in the Equity Courts, as do also the important addition, which follow.

(1) Marriage is a good consideration, not only as between the parties, but as affecting their issue.

(2) The abuse of official or semi-official positions of private trust invalidates contracts.

(3) Mistake, and what is called accident, are grounds of rescission or relief.

(4) Where damages would not be an adequate remedy, specific performance will be decreed.

(5) Executory contracts touching real and personal property are treated as executed, and form sources of rights affecting not only the parties, but their real and personal representatives. This doctrine is most important with reference to a contract for the sale of land.

(6) The requisites of the Statute of Frauds, where a contract relates to land and is partly performed, may be dispensed with.

Specific Performance.

Where the common law remedy of damages for a breach of contract is not adequate, equity will decree a specific performance. We have already stated that the common and ordinary contracts fall within the jurisdiction of the Common Law Courts, because where expedition is required, and a similar thing or article to that contract-

ed for, whether consols or a carriage horse, is easily procured, damages meet the equity of the case. On the other hand, a contract for a particular house or piece of land must be specifically performed (*a*). The Year Book, 8 Edw. IV. 4 b. exhibits the early origin of the remedy.

An agreement to lend a sum of money is not enforced in equity (*b*). Articles of partnership may be, but the Court will hesitate if there exists ill-will between the parties. Sale of shares in a partnership may be enforced (*c*). Still more the sale of shares in a company ordered to be wound up (*d*). Though the payment of an annuity might extend over several years, yet specific performance was decreed at the suit of the grantee.

The Ship Registry Acts forbid the application of this doctrine to contract regarding the ownership of a ship, yet contracts regarding the proceeds of the sale of a ship or the produce of freight are enforced (*e*). The Merchant Shipping Amendment Act, 1862, while keeping the register clear from notice of trusts, enacts that equities may be enforced against owners and mortgages in the same manner as equities may be enforced against them in respect of any other personal property (*f*). Specific performance of a contract to construct a railway is beyond the powers of the Court to control, and therefore has been refused (*g*). TURNER, L. J., held, affirming the decree of the Master of the Rolls, that a covenant for the use of a railway and harbour might be enforced; BRUCE, L. J., dissented (*h*) But specific performance of an award to execute a lease of a right to use a railway has been refused (*i*). Argumentum ab inconvenienti plurimum valet.

An agreement to let a house for three years at a yearly rent, bound the landlord to grant the tenant a lease for a term, from the expiration of the three years' occupancy, at the same rent, the tenant to keep the house in repair. ROMILLY, M. R., decreed specific performance four years after the expiration of the three years (*k*). 21 & 22 Vict., c. 27 enables the Equity Courts to give damages where

(*a*) Cf. Molyneux's case, temp. Charles I.
(*b*) Sichel *v.* Mosenthal, J. (62), 275, M. R.
(*c*) Homfray *v.* Fothergill, 1 E. C. 567.
(*d*) Paine *v.* Hutchinson, 3 E. C. 257; L. J., 2 D. & S. 283.
(*e*) Armstrong *v.* Armstrong, 21 Beav. 78.
(*f*) Sect. 3.
(*g*) Peto *v.* The Brighton, Uckfield and Tonbridge Railway Company—"The Times," 26th June, 1863.
(*h*) Wilson *v.* West Hartlepool Railway and Harbour Company, J. (65), 124.
(*i*) Blackett *v.* Bates, 1 Ch. Ap. 117.
(*k*) Moss *v.* Barton, 1 E. C. 474.

there is a right to specific performance. But the damages are given as an incident to and not in substitution of the usual remedy (*a*).

It is sometimes said that there must be mutuality in the contract. By this is meant mutuality of remedy, not of consideration, for absence of the latter would, as at law, vitiate the contract itself. And the rule refers to cases where something is to be done, that is, where one promise is made in consideration of another. As equity cannot well enforce the substantial performance, it usually leaves the parties to their common law remedies (*b*). To this rule there seems to be an exception when a party, who is freed from liability by the Statute of Frauds, prays for specific performance of a contract touching land. But a person seeking equity being bound to do equity in this case a mutuality arises when plaintiff files his bill.

Contract for the Sale of Land.

This contract is so frequently to be met with in counsel's chambers, and so often calls for adjudication by an equity Judge, that in justice to our readers, we shall consider it somewhat in detail. Some times these contracts are in the form of particulars of the property and conditions of sale, signed in accordance with the Statute of Frauds by the parties or their agent the auctioneer. At other times in the form of articles of agreement, also signed in the like accordance. The terms relate to the price, deposit, title, evidence, abstract, time of payment, and conveying, interest, and remedy for mis-description, &c. Each of these heads might form the subject of a chapter, as is the case in the able works on Vendors and Purchasers by Lord ST. LEONARDS and Mr. DART. Our method, however, does not permit us to enter upon the common law doctrines further than they are connected with equity, and of the equity doctrines many are noticed in other parts of this work.

In both departments of the law a rescission of the contract by either party is allowed when the other is unable or unwilling to perform his agreement; except that in equity—(1) Time is not of the essence of the contract; (2) If there be but a small defect in the quantity or quality of the estate or title, specific performance with compensation will be decreed.

If such misrepresentation or fraud is practised as to ground on action for deceit, the conveyance, even though executed, may in equity be set aside. Inadequacy of price, unless so gross as to be conclusive evidence of fraud, or unless accompanied with circumstances of imposition and oppression, is no bar to the discretion of the Court in granting specific performance. Acquiescence bars a remedy and

(*a*) Lewers *v.* Earl of Shaftesbury, 2 E. C. 270.
(*b*) The cases on railways, p. 111.

confirmation releases a right. If the parties have been at arms-length, a subsequent discovery of another objection is no ground for fresh resistance (*a*). Where the contract itself is founded on fraud or oppression, acquiescence, whilst he is under the same difficulty and embarrassment, will not of itself bar his title to relief. To give validity to a confirmation of a voidable conveyance, the party confirming must not be ignorant of his right, still less can his right be concealed from him by the other party. He must further know that the transaction is impeachable; and with such knowledge and under no influence his execution of the deed must be *sponte suâ*. Knowing not only the fact of the defect of title, but also its consequences in law, he must be a free agent, not under the influence of the previous transaction.

If there is no valid rescission of the contract, and yet one party, without a defence on the ground of fraud, surprise, mistake or otherwise, objects to complete the sale or purchase, the other party, if he thinks damages at law an unsatisfactory remedy, may file a bill in equity paying that the agreement be specifically performed, that proper directions be given for a conveyance and for further relief. The order made may run in the following form :—

"The Court doth declare that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution in case a good title can be made to the hereditaments comprised therein, and decree the same accordingly; and let the following inquiries be made, that is to say: (1) An inquiry whether a good title can be made to the estates comprised in [Lot in the particulars of sale, &c.] the agreement in the plaintiff's bill mentioned; (2) And, in case it shall appear that a good title can be made to the said estates, an inquiry when it was first shown that such title could be made, and that the further consideration be adjourned." The second inquiry may be important with respect to the right to rents or to interest. A clause declaring defendant bound to accept the title subject to a small defect, or with an indemnity against a mortgage, is not infrequent (*b*).

In the above form we find the expression good title brought prominently forward. It is to be observed that in equity a title may be too doubtful, either in respect of a rule of law or a question of fact, to be enforced. In the Superior Courts of Common Law any title though doubtful in equity, on which a plaintiff might recover in ejectment is good. For a list of titles which have been held good or doubtful in equity, the reader is referred to Lord ST. LEONARD'S Trea-

(*a*) Russian Vyksounsky Iron Works Company, 3 E. C. 790.
(*b*) Seton on Decrees, 593.

tise on Vendors and Purchasers (13th ed. ch. 10, s. 3). To those there given the following more recent cases may be added. In *Collier* v. *McBean* (*a*), the estate being given, but charged in the hands of trustees with payment of debts and legacies, after payment thereof, and conveyances to the donee, his title was too doubtful, it not being certain whether the trustees had received an absolute fee or one determinable on payment. In *Minton* v. *Kirwood* (*b*), STUART, V.-C., held, that it is no sufficient objection to the title of the vendor of an enfranchised copyhold, that a mortgagee to whom a surrender had been made had not been admitted before the enfranchisement, the deed of enfranchisement having conveyed to the vendor all the rights of the lord. In *Hume* v. *Pocock* (*c*), the subject of sale was all the estate, right and interest in certain lands, the plaintiff to produce only the title from the vendor. STUART, V.-C., and the Lords Justices, held, that the defendant was not at liberty to show *aliunde* that the plaintiff's vendor had no title. On the usual references the chief clerk certified that the plaintiff could not show a good title; but, it appearing that the defendant had since the purchase acquired the means of curing the defect, leave was given to amend or file a supplemental bill. *Nicholl* v. *Jowell* (*d*) is another noteworthy case. By the will of A., made in 1838, real estate was appointed to B., a married woman. By a subsequent will of 1858, the whole of A.'s property, real and personal, was given to E. The will of 1858 was propounded by E., and probate was opposed by D., the heir at law of A. In the course of the trial a compromise was made. The compromise was signed by C., the husband of B., for himself and wife, and who, though not a party to that suit, was present in Court, and by D.'s attorney for D. and B., though without any express authority from B.

In a suit for the specific performance of the compromise, WOOD, V.-C., held that though the married woman and her husband had taken the full benefit of the arrangement, and only at the last moment dropped the mask, yet specific performance must be refused, as the formalities required by the Act for Abolition of Fines and Recoveries to bind her estate had not been observed.

The minutes of the final decree for specific performance usually are as follows (*e*):—"Declare that the agreement in the plaintiff's bill mentioned, dated , ought to be specifically performed

(*a*) 1 Ch. Ap. 81.
(*b*) 1 E. C. 449.
(*c*) 1 E. C. 423, 662; 1 C. A. 379.
(*d*) 3 E. C. 396.
(*e*) The vendor is supposed to be the plaintiff. The corresponding changes for a vendee plaintiff are easily made.

and carried into execution, and decree the same accordingly: (1) And let interest be computed at the rate of £ per centum per annum on the sum of the [residue of the] purchase-money for the estate comprised in the said agreement, from the day of , when the same ought to have been paid according to the terms of the said agreement: (2) And let an account be taken of the rents and profits of the said estate received by the plaintiffs or any of them, or by any other person since [Here a direction as to costs is sometimes added:] (3) And let upon the plaintiffs executing a proper conveyance of the said estate to the defendant (at the expense of the defendant according to the said agreement), or to whom he shall appoint, such conveyance to be settled by the Judge in case the parties differ, and delivering to the defendant upon oath all deeds or writings in their custody or power relating to the said estate, the defendant pay to the plaintiffs the balance which shall be certified to remain due to them in respect of such money and interest (and costs). Liberty to apply" (*a*).

Specific Performance of Agreements of Land on the ground of Part Performance.

While treating of specific performance of agreements relating to lands it seems more convenient to notice at the same time certain incidental doctrines which in principle appertain to the chapter on Frauds. The Statute of Frauds, it may be remembered, requires such contracts to be in writing and signed by the party to be charged. Where though such an agreement fails to satisfy the requisites of the statute, yet one of the parties has been induced or allowed by the other on faith in the agreement to alter his position, as, for instance, by taking possession, expending money in buildings, or other like acts of part performance, there equity considers it unconscientious that the statute should be insisted upon. Part performance resting on evidence, the application of the doctrine must be learnt from examples. We may premise that an inchoate agreement gives no more title to relief at equity than at law, and that the acts relied on must be referable to the agreement (*b*).

Entrance into possession is an important circumstance, so is expenditure of money in repairs or improvements. Payment of the purchase-money does not entitle to specific performance. In *Millard* v. *Harvey* (*c*), where a father-in-law had promised that his son-in-law should occupy a house during life, the Master of the Rolls held, that the making of repairs did not take the case out of the statute. In

(*a*) Seton on Decrees, 607.
(*b*) Price *v.* Salusbury, J. (63), 838.
(*c*) J. (64), 1167.

Nunn v. *Fabian* (*a*), CRANWORTH, L. C., enforced specific performance of a parol agreement to grant a lease, where the most important if not the only evidence of part performance was a signed receipt for a quarter's rent at the increased rate to be paid under the lease. In accordance with the general doctrine, some of the Judges have felt themselves bound to introduce in some manors a species of tenant right, that is, a right to a long lease after permitted expenditure in building. However, a majority of the Judges in the House of Lords have otherwise settled the law. In *Ramsden* v. *Dyson and Thornton* (*b*), it was held, that if a stranger begins to build on land, supposing it to be his own, and the real owner, perceiving his mistake, leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land, knowing it to be the property of another, equity will not afterwards prevent the real owner from claiming the land, with the benefit of all the expenditure upon it. So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

The making of a will, in accordance with a parol promise of settlement before marriage, will not on the ground of part performance take the case out of the statute (*c*).

Previously to a marriage the intended husband and wife agreed in writing that the husband should have the wife's property for his life, he paying her 80*l*. a year as pin-money, and that she should have it after his death. They gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement, the husband promising, as the wife alleged, that he would make a will giving her all her property. The marriage took place, and the husband made a will accordingly. After his death a subsequent and different will was found. Lord CRANWORTH held, "that marriage being necessary in order to bring a case within the statute, to hold that it also takes the case out of the statute would be a palpable absurdity. And further, that the nature of the alleged agreement was such as hardly to admit even on the part of the party to be charged of anything like part performance. As a will is necessarily until the last moment of life revocable, a contract to make any specified bequest, even when a will having that effect has been duly

(*a*) J. (65), 868.
(*b*) H. L., 1 E. & I. 129.
(*c*) Caton *v.* Caton, 1 C. A. 137.

prepared and executed, is in truth a contract of a negative nature, a contract not to vary what has been so executed, I do not see how there can be part performance of such a contract." The decision has been affirmed in the House of Lords (*a*).

Where a parol variation of a contract has been in part performed, a decree for specific performance may be obtained. Though there be a written contract, see Act I of 1877, ss. 12—30 parol evidence is admissible in equity in all cases of fraud and mistake, and even to prove the total abandonment of a contract.

For the doctrines relating to fraud, see the note to section 88 and Griffith's Institutes of Equity, p. 113.

The doctrines relating to mistake are succinctly stated in Griffith's Institutes of Equity, pp. 81-88, as follows:—

MISTAKE.

The term Mistake differs from the logical term misapprehension. The latter denotes a failure of the mind in forming a clear conception of an idea, the former a failure in acquiring a knowledge of matters of fact. From misapprehension, indeed, inadvertence or surprise, mistakes frequently arise. But one is a cause, the other an effect (*b*).

Ignorantia juris neminem excusat, ignorantia facti excusat. The law is a science, and it is culpable negligence to draw out or enter into a contract without learning and weighing the part of the science which relates to the act or contract. "But no person can be presumed to be acquainted with all matters of fact; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge" (*c*). Facti interpretatio etiam prudentissimos fallit (*d*); and therefore an ignorance of facts does not import culpable negligence. But still, though the negligence be not gross, in many cases active diligence is requisite.

Cases are to be found in the law books in which an ignorance of law seems to have been the ground of relief; Lord WESTBURY suggested an ingenious interpretation of the maxim which reconciles apparently conflicting authorities. 'Jus' may be used in the sense of

(*a*) W. N. (67), 158.

(*b*) Some who hold with Lord COKE, 4th Institute, ch. 8, that the subjects of equity jurisdiction are three—covin, accident, and breach of confidence—make mistake a species of accident. But a mistake entitles to relief as affecting the inception of a contract, while accident affects the performance of a valid contract.

(*c*) Story, § 140.

(*d*) Neratius; Phillimore on Jurisprudence, 96.

general law, or of a portion which appertains to an individual, *viz.*, a private right (*a*).

It is a rule of general jurisprudence, which holds at Common Law and in Equity, that where there is no consensus ad idem, no mental acceptance of the proffer, there is no contract: Non videntur qui errant consentire (*b*). Thus Lord Chancellor THURLOW in *Calverley* v. *Williams* (*c*), said, "That if it were proved that one party thought that he had purchased *bonâ fide* what the other thought he had not sold, it was a ground to set aside the contract:" and Sir T. PLUMER in *Clowes* v. *Higginson* (*d*), speaking of Lord Chancellor THURLOW's opinion on this point, states also, as the view of Sir W. GRANT, that the consequence of such a mistake would be, that in reality there was no agreement, but that the parties misunderstanding each other, the one proposing to buy one thing, the other to sell another, a contract so framed in mistake cannot consistently with justice be executed. Under similar circumstances a contract was ordered to be cancelled in *Price* v. *Ley* (*e*). But it is to be remembered that parties may agree to a contract concerning incidents of which, not going to the root of the consideration, they are willingly ignorant; they may also contract with respect to contingencies, the events of which cannot be foreknown, as in policies of assurance; they may also contract by way of compromise, upon supposition of a right or doubtful right. Thus Lord Chancellor MACCLESFIELD, in *Cann* v. *Cann*, (*f*) lays down the rule, "That an agreement entered into upon the supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on the one side or the other; and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement."

A compromise cannot stand if there is knowledge on the one side which is withheld from the other (*g*).

The rule applies to compromises approved of by the Court on behalf of infants.

In *Stainton* v. *The Carron Iron Company* (*h*), Lord Justice TURNER said:—"Where one of the parties has claims more or less extended

(*a*) Cooper *v.* Phibbs, H. L., 2 E. & I. 149.
(*b*) Digest, 50, 17, 116, 2.
(*c*) 1 Ves. J., 210.
(*d*) 1 Ves. & B., 524.
(*e*) J. (63), 295.
(*f*) 1 P. Wms., 723.
(*g*) Brooke *v.* Mostyn, L. J., J. (64), 1114.
(*h*) J. (61), 645.

against the other, the usual considerations which apply to cases of compromise, such as whether the parties understood their rights and questions of that nature, although perhaps they ought not wholly to be laid out of view, cannot have the same decisive effect as might fairly be attributed to them in an ordinary case. The question in such a case is not so much what the parties knew of their rights as what they intended to do,—whether the compromise which they have made was meant by them to cover all the claims, or to which of them it was meant to apply." On appeal to the House of Lords the decree was affirmed (*a*).

In *Hanslip* v. *Kitton* (*b*), Lord Chancellor WESTBURY stated that it was a universal rule of law that a release is limited entirely by the recitals which precede it.

In order that relief may be obtained on the ground of mistake, a restitutio in integrum must be possible. A change of condition may be fatal to the claim. This was held to be law by Lord ROMILLY in the *Bishop of Natal* v. *Gladstone* (*c*):—"A contract was entered into by three parties to it,—the Crown, the trustees of the fund on behalf of the contributors, and the plaintiff,—and although it is true that this Court will occasionally refuse specifically to enforce a contract where one of the parties who entered into it did so by mistake, and while ignorant of the real state of the case, yet, where the contract has not only been entered into, but has also been acted upon, and where it is impossible to restore all the parties to it to the same position which they were in before the contract was made, the Court of Chancery never annuls the contract. Who can now restore the plaintiff to his former condition in 1853? Assume that the contributors can truly say: "We subscribed this fund to make the plaintiff a bishop, with coercive powers inherent in his own episcopal jurisdiction. We find that the plaintiff as bishop must have recourse to a Court of law for that purpose, and we therefore annul the engagement." Could any Court listen to such arguments, or could such a doctrine be admitted to annul the contract? All persons are bound to know the law. Ignorance of the law, according to the hackneyed but most necessary maxim in our jurisprudence, and indeed in every jurisprudence, excuses no one. The contributors must therefore be treated as knowing, or as being bound to know that to enforce the decision of the bishop he must have recourse to a Court of civil jurisdiction, and that the Court so resorted to would sit in judgment upon and review the correctness of the decision to this extent—that

(*a*) J. (64), 783.
(*b*) J. (62), 1113.
(*c*) Bishop of Natal v. Gladstone, 3 E. C. 53.

the Court would ascertain whether the bishop had acted within the scope of his authority, and had proceeded in a manner consonant with the principles of justice, and the plaintiff might justly say to the contributors: "You cannot now recede from your engagement, because that is made manifest to you which from the first you must or ought to have been well acquainted with."

A most important class of cases involving a compromise are those of family arrangements or settlements.

Lord Chancellor HARDWICKE, in *Stapilton* v. *Stapilton* (*a*), ruled that were an arrangement is for the purpose of saving the honour of a father and his family, and is a reasonable agreement, if it is possible for a Court of Equity to decree a performance of it, it ought to be done. In *Williams* v. *Williams* (*b*), the late Lord Justice TURNER, a Judge distinguished for his mastery of the practice of conveyancers, said:—"It has been strongly urged—that is, in argument—that cases of family arrangements extend no further than to arrangements for the settlement of doubtful or disputed rights. But this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for preservation of its peace, but to cases in which arrangements are made between them for the *preservation of its property*. The resettlement of family estates, upon an arrangement between the father and the eldest son on his attaining twenty-one, may well be considered as a branch of these cases, and certainly this Court does not in such cases inquire into the *quantum* of consideration."

At law the written contract, unless there is fraud or illegality, is conclusive. In a suit for specific performance the decree is frequently barred by the defendant proving a mistake, and Equity goes still further in that it allows such mistake to be proved by parol.

But instruments may be rectified on the ground of presumed mistake, or mistake directly proved (*c*).

Thus in cases of a loan made to two, where the instrument has merely expressed a joint obligation, Equity has considered it joint and several; and a partnership debt has been treated as several,

---

(*a*) 1 Atk., 2.

(*b*) 2 C. A., 394.

(*c*) On a bill for the rectification of a marriage settlement, where the mistake is common to both parties, relief may be decreed, without a restitutio in integrum. Harris v. Pepperell, W. N. (67), 265.

though it is at law only joint. And a post-nuptial settlement will be rectified in accordance with articles entered into before marriage. And where the articles are final, and the settlement made before marriage is expressed to be in pursuance thereof, it may be rectified.

But in order that a deed may be reformed, the mistake must have been an error common to both parties to the contract (*a*).

Relief in cases of conveyances with respect to the parcels, and of settlements with respect to the limitations, have been granted on the ground of a mistake by the attorney of instructions (*b*).

In *Daniel* v. *Arkwright* (*c*) an appointment under a power to a child, her husband and children, by deed-poll, was rectified, and the limitation made to the child absolutely and alone, such being the intention of the appointors, which had been frustrated by the error of the solicitor.

In *Dendy* v. *Cary* (*d*), Vice-Chancellor Wood held the grantor of a lease liable even after execution, on a parol promise to allow a right of way on faith of which the contract was entered into and alterations made in the house.

Debtor becoming creditor's representative.

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

Advantage gained by fiduciary.

88. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold

(*a*) Bradford *v.* Romney, J. (62), 403, M. R.
(*b*) V. &. P. 143.
(*c*) J. (64), 764.
(*d*) J. (63), 845.

for the benefit of such other person the advantage so gained.

Illustrations.

(*a*) A, an executor, buys at an undervalue from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit of B the difference between the price and value.

(*b*) A, a trustee, uses the trust-property for the purpose of his own business. A holds for the benefit of his beneficiary profits arising from such user.

(*c*) A, a trustee, retires from his trust in consideration of his successor paying him a sum of money. A holds such money for the benefit of his beneficiary.

(*d*) A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.

(*e*) A, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lákh of rupees. A holds the lákh for the benefit of the partnership.

(*f*) A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital.

(*g*) A, an agent employed to obtain a lease for B, obtains the lease for himself. A holds the lease for the benefit of B.

(*h*) A, a guardian, buys up for himself incumbrances on his ward B's estate at an undervalue. A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid.

Commentary.

A plaintiff was holder of bonds, bearing on their faces 6 per cent. interest issued by a foreign government (that of rem) through the defendants who were their agents in England, by which the foreign republic upon the national faith pledged the general revenue of the republic and especially the free proceeds of the guano imported by the republic into the United Kingdom after the engagements contracted on them were covered and bound itself in all the contracts which it might enter into for the sake of the guano to set aside in each half year a sum sufficient for the service of the half year, and after such service was secured to dispose freely of the proceeds of

the surplus. The plaintiff brought an action on behalf of himself and all other holders of the bonds stating in his claim that the republic had from time to time forwarded to the defendants large quantities of guano for the purpose of paying interest on the bonds which they refused to apply to that purpose and threatened to apply in satisfaction of a lien claimed by themselves, and he claimed a declaration that he and the other bond-holders had a claim upon the proceeds of the guano in priority to any claim by the defendants. He also alleged that the foreign republic made no claim to the proceeds of the guano, but offered to make it a party if so desired. The defendants demurred to the statement of claim on the ground that the plaintiff had no charge upon the proceeds of the guano and also on the grounds of want of jurisdiction and of parties. The Court of Appeal held that no fiduciary relation was alleged between the defendants and the plaintiff; that the guano being the property of a foreign government, the Court had no jurisdiction to attach it or the proceeds thereof; and that the defendants being agents of the foreign government could not be sued in the absence of their principal.—*Twycross* v. *Dreyfus*, L. R., 5 Ch. D. 603.

ELDON, L. C., in *Hatch* v. *Hatch*, 9 Vesey, 292, said, "A young man could not do a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee having done his duty, the *cestui que trust* taking it into his fair, serious, and well informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature for the reason often given, and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a Court of justice, that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression."

Gifts from children to parents are looked upon in the same light (*a*). Gifts contrary to the intention of a deed creating powers have been already noticed. Cases involving such gifts must not be confused with family settlements or arrangements, nor with those cases in which the Courts allow property given to the children, and for their maintenance, to be paid to poor parents.

And so Lord Justice TURNER, in *Baker* v. *Bradley* (*b*), laid down the rule that on a child coming of age, if he or she make a settlement of his or her property for the benefit of the family, in which the father or mother gets no benefit at all, the Court will not inquire

(*a*) Davies *v.* Davies, V.-C. S., J. (63), 1002.
(*b*) 7 D., M. & G. 597; cited in Chambers *v.* Crabbe, by M. R., J. (66), 277.

into the degree of influence, but consider it for the benefit of the family; but if it is tainted with the slightest advantage to the parent, who induces the child to enter into the transaction, the whole thing is bad, unless it can be proved not merely that the child knew what the transaction was, but that she was in no respect influenced by the peculiar relation in which they stood to each other.—Griffith's Institutes of Equity, pp. 192—200.

Seeing that mortgagors are usually in pecuniary difficulties, that they may owe a long arrear of interest, that they often are small traders struggling under debts which they are unable to pay, and in the power of any creditor who uses pressure, the Equity Courts view a lease or a sale of the equity of redemption by a mortgagee to the mortgagor with jealousy. "It has been laid down by the editor of a valuable text book (Powell on Mortgages) without sufficient qualification, that a mortgagee may purchase from the mortgagor his equity of redemption. Lord REDESDALE, in the case of *Webb* v. *Rorke* (*a*) says that the Courts view transactions between mortgagor and mortgagee with considerable jealousy, and will set aside the sale of the equity of redemption where, by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase. In the case of *Hickes* v. *Cooke* in the House of Lords (*b*) it was said, that a lease obtained by the mortgagee from the mortgagor was more objectionable than the purchase of the entire equity of redemption. It is clearly laid down by Lord ELDON in that case, that the taking of a lease from the mortgagor by the mortgagee is objectionable. Why is a lease from a mortgagor to a mortgagee liable to be impeached, and a sale of the mortgaged property to be treated as a transaction which is unimpeachable? The same objection seems to exist as to both transactions. A mortgagee may be a man of wealth, and in a situation to make any contract he pleases with the mortgagor; but the principle upon which the Courts act is not that the mortgagor is unable to enter into a contract of this kind, but that the transaction ought to be looked upon with jealousy, especially when the mortgagor is a needy man, and when there is pressure and inequality of position, and the sale has been at an undervalue (*c*).

In the case before us, the mortgagor having become bankrupt, the deed conveying the equity of redemption was set aside at suit of the creditors' assignee.—Griffith's Institutes of Equity, pp. 192—194.

(*a*) 2 Sch. & Lef. 661.
(*b*) 4 Dow., 16.
(*c*) V.-C. Stuart, Ford *v.* Olden, 3 E. C. 463.

Purchase by a trustee for sale. Ordinary purchases trespassing on the line of rectitude and purchases, by trustees for sale were discussed and principles settled by Lord Chancellor THURLOW in *Fox* v. *Macbreth and Pitt* v. *Macbreth*, 2 Con. 320. He said, "I do not agree with those who say that wherever such an advantage has been taken in the course of a contract by one party with another as a man of delicacy would refuse to take such a contract shall be set aside." "It is not only necessary that great advantage should be taken in such a contract and that such an advantage should arise from a superiority of skill or information, but it is also necessary to show to me an obligation binding the party to make such a disclosure." But "if a trustee though strictly honest buys an estate himself and then sells it for more yet according to the rules of a Court of Equity from general policy and not from any peculiar imputation of fraud, a trustee shall not be permitted to sell to himself, but shall remain a trustee to all intents and purposes."

"A trustee, said ELDON, L. C., may buy from the *cestui que trust* provided there is a distinct and clear contract ascertained to be such after a jealous and scrupulous examination of all the circumstances that the *cestui que trust* intended the trustee should buy and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. I admit that it is a difficult case to make out wherever it is contended that the exception holds. Though a purchase of a reversionary interest at an auction is not tainted by undue influence or supposed undervalue, a trustee cannot sustain a purchase by himself or another on his behalf at a public auction. An additional reason to that laid down by THURLOW, L. C., is that intending purchasers are discouraged by seeing the vendor bid against them.—*E. P. Lasey*, 6 Vesey, 629.

A mortgagee exercising his power of sale cannot purchase on his own account neither can his solicitor, nor agent, nor secretary. It was a Building Society's Mortgage. NORTH, J.—*Martinson* v. *Clowes*, L. R., 21 C. D. 860.

"The principle was clearly recognized in *Fox* v. *Macbreth* and was established long before.—*Coles* v. *Frecothick*, 9 Vesey, 324. A trustee who has disclaimed and other nominal trustees are not within the general rule against purchases by trustees of the property of the *cestui que trust*."—*Chembers* v. *Waters*, 3 Sim. 42.

Should a solicitor or other agent employed to sell purchase from his principal without making a full disclosure of all he knows "it is perfectly well settled that the principal need not prove undervalued. He is entitled as of course to set the sale aside."—*Crowe* v. *Ballard*,

3 B. C. C. 117. So if the agent were to buy for his principal an estate vested in a third party a secret trustee for this agent, the purchase would be set aside.—*Brockman* v. *Rothschild*, 2 Dow. Clark, 688.

Should a stockbroker purchase the stock of his employer, or sell his own stock to him without his knowledge either transaction would be set aside.—*Gillett* v. *Peppercome*, 3 Beav. 78; *Bank of Bengal* v. *Macleod*, 7 Moore, P. C. 38.

An attorney or solicitor, ELDON, L. C. decreed, who buys from his client "can never support it unless he can prove that his diligence to do the best for the vendor has been agreed as if he was only an attorney dealing for that vendor with a stranger. That must be the rule. If it appears that in that bargain he has got an advantage by his diligence being surprised putting fraud and incapacity out of the question which advantage with due diligence he would have prevented another person from getting a contract, under such circumstances shall not stand. The principle so stated may bear hard in a particular case, but I must lay down a general principle that will apply to all cases."—*Gibson* v. *Jeyes*, 6 Vesey, 266. A solicitor purchased a leasehold interest from his client and himself prepared the assignment which contained no covenant to indemnify the vendor. BRADY, L. C., held that the personal representative of the solicitor must indemnify.—*Greenfield* v. *Bates*, 5 Ir. Ch. 219. Executors and administrators occupy the position of trustees for the persons interested in the estate. They must account for any gain made by purchasing property or compounding debts.—*Hall* v. *Hallet*, 1 Con. 134. Under the term 'other person' are included bankruptcy receivers and commissioners.—*E. P. Dombell*, Mont. 33; Arbitrators. —*Blennerhasset* v. *Day*, 2 Ball. & B. 116.

The several cases which have occurred in which solicitors have been restrained from acting against their former clients or communicating information acquired in such employment proceed upon a principle which governs a transaction in which a barrister or counsel buys up securities on his client's property.—*Carter* v. *Palmer*, 8 Cl. & F. 657.

The remedy of the *cestui que trust* where his trustee has purchased the trust estate contrary to the rules of the Court goes to the same persons who were entitled to the estate before the sale. Therefore a legal or equitable mortgagee on the estate who was not satisfied by the purchase-money may pursue the remedy against the trustee. And the circumstance of the mortgagee having been present at the sale where he bid for the estate is no objection to his claim against the owner of the estate where the latter has set aside the sale and

derived an advantage from it. V. and P. by Lord ST. LEONARD, ch. XX, s. 2, § 20. If the estate though sold has not been conveyed to a purchaser without notice and the *cestui que trust* requires a reconveyance, he must repay to the trustee the original price, and also all sums laid on for permanent improvement and interest thereon from the time they were actually disbursed and the trustee must pay and allow all the rents received by him and the yearly value of such part as have been in his own occupation, and all sum received by the sale of timber on other parts of the inheritance and interest thereon from the time of their being received. The purchaser has been allowed in some cases for improvements of all kinds. In one he received the costs of erecting a Mansion house and plantations of shrubs.—*York Buildings Company* v. *Mackenzie*, 8 Bro. P. C. 71n. We extract from the authoritative work on the Law of Vendors and Purchasers by Lord ST. LEONARD, the following rules, ch. XX, s. 2, § 23, &c.: Where the *cestui que trust* is not desirous to take back the estate, he may require it to be put up to sale again at the price at which it was bought by the trustee; and that if any one bid more, the trustee shall not have the estate, but if not, he may be compelled to keep it.

If however the *cestui que trust* be desirous to have the estate put up in lots and it was bought by the trustee in one lot, he must repay the trustee the purchase-money with such interest as he would have been liable to pay upon his bargain he accounting for the rents received or paying an occupation rent for the estate if he personally occupied it. In case of resale the money allowed for improvements will be added to the amount of the purchase-money and the estate will be put up at the aggregate sum deducting however an allowance for acts that deteriorate the value of the estate. If any old buildings have been pulled down by the purchaser and new ones erected, the old buildings, if they were incapable of repair, will be valued as old materials, but otherwise as buildings standing.

But it is no ground in his favour that stocks have greatly risen since his purchase so that he cannot lay out his money to the same advantage.

If the trustee has actually sold the estate, the *cestui que trust* may compel the trustee to pay him what he may have received above the original purchase-money.

Generally, although there be no fraud, the trustee ought to pay the costs of a suit occasioned by his improper dealing with the estate. And where infants are concerned, the decree for resale will be with costs. Where the property has been resold by the trustee although a like property can be purchased as where the subject is a share in

a public company whose shares are on sale, the Court will not decree it to be replaced, but compel the trustee to account for the profit with interest.

A purchaser from the trustee with notice of the previous transaction will be liable to the same equity as the trustee was subject to. But this doctrine cannot be extended to the mere case of a purchase by a trustee in his own name from the *cestui que trust*, which may or may not be binding according to circumstances unless the purchaser have also notice that the sale was such as could not be supported in equity.

The trustee claim may acquire the character of a right by the long acquiescence of the *cestui que trust*. See Griffith's Institutes of Equity, Maxim, xvi.

The promoters of a company who were also directors purchased land and sold it at an increased price to the company and retained the difference. Part of the purchase-money consisted of debenture bonds. The company went into liquidation and L one of the directors purchased 100 of the bonds at 25 per cent. and claimed to prove for them. MALINS, V. C., held that L as director could not plead ignorance of the purchase by which the company was defrauded; that having been in the position of trustee for the shareholders he could not by purchase of the debentures after the insolvency make profits out of a transaction which as trustee he ought to have prevented. On the claim being heard by the Court of Appeal, the matter was compromised by the official liquidator paying to him the sum he had given for the bonds with interest thereon.—*I. R. Imperial Land Company of Marseilles*, E.P. Larking, 4 Ch. D. 506; *Liquidators of the Imperial Mercantile Credit Association* v. *Coleman*, L. R., 6 H. L. 189. A purchase by an executor of one-fifth of 170,000 Rs. decreed to be due, for the price of 5,000 Rs. was set aside on terms.—*Dhonender Chunder Mookerjee* v. *Mully Lall Mookerjee*, by the Privy Council, L. R., 2 I. A. 18. See also *Patterson* v. *Gas Light and Coke Company*, 3 App. Ca. 239.

In *Clack* v. *Carlon*, 7 Jurist, N. S. 441, solicitors in partnership agreed one with the other that one of them being a trustee should not participate in the profits nor derive any benefit from the business done by him for the trust. This did not prevent him employing his partner to transact the trust business at the ordinary charges.

A beneficiary who assisted by the advice of an independent solicitor gives a general release to a solicitor's trustee who has charged for professional services will not without other circumstances be allowed to open the account.—*Barrett* v. *Hartley*, L. R., 2 Eq. 789.

Bankers who lend money to their customers at compound interest cannot, when acting as trustees, borrow money from themselves.—*Croskell* v. *Bower*, 32 Beav. 86.

One of three mortgagees being a solicitor arranged with another solicitor to act as his agent on agency terms, Sir J. ROMILLY, held that his share of the profits enured to the persons entitled to the equity of redemption.—*Taylor*, 18 Beav., 1651; *Schler* v. *Cottam*, 3 Jurist, N. S. 630; *Broad* v. *Selfe*, 9 Jurist, N. S. 885. But *in re Donaldson*, 27 Ch. D. 544. BACON, V. C., held that a solicitor in such a position might charge profit costs. And to a similar effect is *Whitney* v. *Smith*, L. R., 4 Ch. App. 513.

The practice in the English Courts was to allow executors in India £5 per centum on the debts got in *Chetham* v. *Andley*, 4 Vesey, 72. A legacy given to him for his trouble prevented the application of the rule, unless he renounced the legacy, and then he might take the commission.—*Freeman* v. *Fairlie*. The present practice is not to allow any commission unless it is expressly given by the testator.—*Matthews* v. *Bagshaw*, 14 Beav. 126.

An annuity given to a trustee so long as he continues to execute the office and a legacy to an executor for his trouble are both conditional. In the former case on winding up the trust, the annuity ceases in the latter the legacy never can vest in an executor who renounces.—*Hull* v. *Christian*, L. R., 17 Eq. 546; *Slaney* v. *Halney*, L. R., 2 Eq. 418.

A testator by his will authorized any trustee thereof who might be a solicitor to make the usual professional or other proper reasonable charges for all business done and time expended in relation to the trusts of the will whether such business was usually within the business of a solicitor or not. On the further consideration of an action for the administration of the testator's estate, an order was made for the taxation of the costs, charges and expenses of the trustees and it was directed that the taxing master should have regard to the terms of the will as to the costs of the trustees. Held, that the taxing master had power to allow to a trustee who was solicitor the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estates.—*I. R. Ames*, 25 Ch. D. 72. A solicitor drawing a will ought not to put in a very sweeping clause to allow himself costs unless instructed by the testator so to do.—*I. R. Chapple*, 27 Ch. D. 584.

A purchaser who has represented to an intending purchaser of land that he has not a security over that land and induced him to buy under that belief cannot as against that purchaser put that security into force.—*Munnoo Lall* v. *Lalla Choonee Lall*, L. R., 1 I. A. 144.

If it be proved that an executor or trustee has made more than £4 per centum on balances retained in hand, he will have to account for interest at the rate of profit made. In other cases he will have to account at the rate of £4 per centum.—*Emmet's Estate*, 17 Ch. D. 142. A solicitor who improperly pays trust moneys into the account of the firm will be charged £5 per centum interest thereon, but not compound interest, inasmuch as a solicitor's business is not a trade wherein compound interest is made.—*Burdick* v. *Garrick*, L. R., 5 Ch. App. 233.

The estate of a deceased partner who has made another partner executor, if allowed to remain in the trade without a settlement of accounts is entitled to a share of the profits.—*Vyse* v. *Foster*, L. R., 7 H. L. 329; and generally, partners standing in a fiduciary relation on the effluxion or termination of the relation by time, death, or bankruptcy the continuing manager of the business must account for the profits, but he will be allowed all expenses properly incurred. *Flockton* v. *Bunning*, L. R., 8 Ch. App. 323; *Yates* v. *Fenn*, 13 Ch. D. 839. But the representatives of a deceased partner cannot prove for his share of the capital in competition with the joint-creditors of the firm.—*E. P. Blythe*, 16 Ch. D. 620.

The case is different where the surviving partner wrongly possesses himself of assets of the deceased partner which are not part of the joint estate and employs them in the business.—*E. P. Westcott*, R. 9 Ch. App. 626.

A beneficiary who is also a trustee cannot compel a co-trustee to replace a fund misapplied by them both, but he may recover his portion from the person who has actually received and spent it. ROMILLY, M. R.—*Buller* v. *Carter*, L. R., 5 Eq., 281. Concurrence in a breach of trust not amounting to fraud will not preclude persons under disability from taking proceedings against a trustee guilty of a breach.—*Sharpe* v. *Ford*, L. R., 4 Ch. App. 35.

A person entitled in reversion may if possessed of sufficient knowledge so assent to a breach of trust as to bar himself by acquiescence.—*Taylor* v. *Cartwright*, L. R., 14 Eq. 176. And after a great lapse of time, such acquiescence will be presumed. CAMPBELL, L. C. —*Life Association of Scotland* v. *Siddal*, 3 DeG. F. & J. 74; *Smethurst* v. *Hastings*, 30 Ch. D. 490.

An agent public or private ought not to use money entrusted to him so as to benefit himself. This principle applies to a clerk in a Government office.—*A. G.* v. *Edmunds*, L. R., 6 Eq. 381, to the Registrar of a Court of Justice.—*Kerakoose* v. *Serle*, 4 Moore P. C. 459; to the promoter of a company.—*New Sombrero Phosphate Company* v. *Erlanger*, 3 App. Ca. 318; *Bagnall* v. *Carlton*, 6 Ch. D. 371; and to the

Secretary of a Company—*I. R. Morvah Mining Company*, W. N., 1875, p. 184. A landholder's steward having contracted with a drainage company to execute as their agent and surveyor drainage works on his master's property had to pay over to his master the profit which he had made by the contracts.—*Waters* v. *Earl of Shaftesbury*, L. R., 2 Ch. App. 231.

Where one executor is a defaulter it is safer for his co-executor who is solvent to appear by a separate solicitor. He will be clearly entitled to his costs while the defaulting executor's costs will be retained as a set-off against what is due from him.—*Smith* v. *Dale*, 18 Ch. D. 518. A beneficiary may obtain an order to tax the costs of his trustees solicitor on the scale allowed between solicitor and client, not on that between party and party unless blame is imputed, —*I. R. Dickson*, 3 Jurist, N. S. 29; but the bill should not contain any charges not directly connected with the administration of the estate—*I. R. Brown*, L. R., 4 Eq. 464.

Should a trustee's lien for his expenses upon the trust estate be ineffectual he may proceed against the beneficiary personally.—*Butler* v. *Cumpston*, L. R., 7 Eq. 16; *I. R. Southampton Imperial Hotel Company*, W. N. 1872, p. 53.

In *Rayner* v. *Preston*, 18 Ch. D. 13. JAMES, L. J., said: It is not accurate to call the relation between the vendor and purchaser of an estate under a contract which rests *in fieri* the relation of trustee and beneficiary. But that is because it is uncertain whether the contract will or will not be performed. But after the contract is performed by actual conveyance or in everything but the mere formal act of sealing then that completion relates back to the contract and it is thereby ascertained that the relation throughout was that of trustee and *cestui que trust*. That is to say while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. That being so it is a universal rule of equity that any right which vested in a trustee by reason of his legal ownership is taken for the beneficial owner. The right in dispute was a policy of fire insurance which accrued owing to a fire damaging a house sold and purchased, after entering into the contract of sale and purchase. It is to be remarked that BRETT and COTTON, L. J. J., thought that there was no trust and that the insurance office could recover the money back from the vendor. In our opinion the decision of JAMES, L. J., is the more equitable.

A sub-agent employed to sell a ship at a minimum price purchasing it for himself without the knowledge of the principal and reselling it at a larger sum is bound to account for the profit made. A custom which exists at certain ports for an agent employed to sell at a limit,

taking it himself at that limit and at his option is invalid.—*De Bussche* v. *Alt*, 8 Ch. D. 287.

A trustee who has in good faith sold an estate is not prevented from subsequently purchasing it himself from his own vendee.—*Baker* v. *Peek*, (L. C. and L. J., reversing the decision of STUART, V. C.), 472.

"The authorities," said HATHERLEY, L. C., "show that this Court will set aside every sale out of Court to a trustee, and will further fix him with the price he proposed to give in the event of the property not fetching more upon a resale. The cases where liberty to bid has been refused are mostly cases of solicitors, the reason of the rule being that solicitors must have acquired much information and that the Court could feel no security that he would do his duty and communicate the information so as to raise the price if he had the prospect of becoming the purchaser. But the reason of the rule applies as strongly to trustees as to solicitors." "It has been said that the plaintiff's bidding will be an advantage to the sale, as the more bidders there are the better chance there will be of a good sale; but on the other hand the knowledge that the trustee is a bidder might keep others away, as they might consider that he would bid to the utmost value of the property and then if any one else would bid more would leave it." "The rule is that if those who are interested in an estate insist that a trustee ought not to be allowed to bid, the Court will certainly give so much weight to their wishes as to say that until all other ways of selling have failed he shall not be allowed to buy.—*Tennant* v. *Trenchard*, L. R., 4 Ch. Ap. 456.

H a devisee for sale in trust under a will was interested in the proceeds of sale under his marriage settlement whereof the trustees had power to purchase a residence for him and his wife. Part of the estate devised in trust for sale consisted of a dwelling-house, which H and his wife requested the trustees to buy as their residence. They authorized H to buy in their name. H instructed an agent to bid in their name up to £8,000, and as vendor directed the auctioneer to fix the reserve price which he did at £6,000, not knowing that the trustees were prepared to bid £8,000. The house was bought for the trustees at £7,230. Beneficiaries under the will who were infants brought an action to ascertain whether the sale was for their benefit and praying that the property might be put up again at an upset price. BACON, V. C., observed that "this was one of those cases as to the duties of trustees which strains the principles upon which the Court acts as severely as any he ever heard of. But keeping in mind the strict rules which the Court has laid down respecting the conduct of trustees or rather to insure the due discharge of the

duties of trustees—acting with a sense of that implacable jealousy which the Court always feels and exercises in dealing with the conduct of trustees. I cannot perceive in the case blame or wrong of any sort." H refused to make any decree.—*Hichley* v. *Hichley*, 2 Ch. D. 90.

A mortgagee with a power of sale is a trustee for sale and cannot without the express authority of the mortgagor purchase the estate upon which the mortgage is a charge. The same principle is applicable to the solicitor conducting the sale.—*Robertson* v. *Norris*, 4 Jurist, N. S. 155; and to the secretary of a building society selling as mortgagees.—*Martinson* v. *Clowes*, 21 Ch. D. 857. The ordinary relation of mortgagor and mortgagee does not prevent the latter purchasing the equity of redemption; but he must not make use of his position to coerce the former to sell for less than another would have given.—Griffith's Institutes of Equity, p. 192.—*Prees* v. *Coke*, L. R., 6 Ch. Ap. 645.

Where an agent to purchase sells his own property to the principal, though acquired before the agency existed, the principal if he has been kept in ignorance may rescind the contract and have an account. But where he declines to rescind or other transactions render it impracticable, he is without remedy unless there had been actual as well as constructive fraud.—*Cape Breton Company*, 26 Ch. D. 221; *Ambrose Lake Tin and Copper Mining Company*, 14 Ch. D. 390; *Waddell* v. *Blochey*, 4 Q. B. D. 678; HENLEY, L. K. held, parol evidence inadmissible to prove a verbal agreement by an agent to purchase an estate for a principal which he purchased with his own money, for said he such admission would overturn the Statute of Frauds.—*Bartlett* v. *Pichersgill*, 1 Eden 515. But the Statute of Frauds ought not to be made an instrument of fraud.—*Hard* v. *Pelley*, L. R., 4 Ch. Ap. 548; *Chattock* v. *Muller*, 8 Ch. D. 177.

Co-owners of a ship like other partners are agents one for the other, and one co-owner who acts as ship husband can make no profit upon goods supplied by himself.—*Richie* v. *Couper*, 28 Beav. 344.

A principal selling to his agent is entitled to set aside the sale upon equitable grounds whatever may have been the price obtained for the property. The use of another's name as purchaser, though a fair price be given, is sufficient ground for setting it aside.—*McPherson* v. *Watt*, 3 App. Ca. 254; so is the withholding peculiar knowledge; but an honest purchase is sustainable.—*Wentworth* v. *Lloyd*, 10 Jurist, N. S. 960. Should the agent take only a partial interest its exact nature must be disclosed.—*Imperial Mercantile Credit Association* v. *Coleman*, L. R., 6 H. L. 189; *Morvah Consols Tin Mining Company*, 2 Ch. D. 1. While the contract continues executory and the agent has power to rescind it he cannot repurchase except for his principal.

When the agency is terminated, he may purchase for himself but the natural suspicions arising from such a transaction renders it advisable to retain precise evidence of his good conduct.—*Parker* v. *McKenna*, L. R., 10 Ch. Ap. 96; *Hay's case*, L. R., 10. Ch. App. 93. An auctioneer's agency is virtually terminated when the hammer has fallen and the contract has been signed.—*Parker* v. *McKenna*, L. R., 10 Ch. App. 96.

It shows a want of prudence in a solicitor who purchases from a client not to insist upon the intervention of another professional adviser to act on behalf of the client.—*Pisani* v. *Att.-Gen. for Gibraltar*, L. R., 5 P. C. C. 516. A solicitor who has purchased securities given by his client for less than the amounts secured will only be allowed the sum actually given by him notwithstanding a clause to the contrary effect inserted in a deed—*Macleod* v. *Jones*, 24 Ch. D. 289.

A tenant for life is not in a fiduciary position towards those in remainder, he may therefore purchase from a trustee selling the estate.—*Dicconson* v. *Talbot*, L. R., 6 Ch. Ap. 32. A tenant for life though the only surviving trustee appointed by a deed or will can give a good title which a purchaser is bound to accept.—*Forster* v. *Abraham*, L. R., 17 Eq. 351.

An executor that is one who has proved ought not to purchase a legacy even if the legatee be a co-executor.—*Biel's Estate*, L. R., 16 Eq., 577; *Clark* v. *Clark*, 9 App. Cas. 733.

Where the beneficiary does not wish for a re-conveyance of the property purchased, he may obtain an order that the expense of repairs and improvements substantial and lasting and such as have a tendency to produce a better sale shall be added to the purchase-money and that an allowance for acts which have deteriorated its value be subtracted and that the estate be put up by the auctioneer at the balance; and that if a larger sum be offered, the trustee shall not have the estate, but that otherwise he shall be kept to his bargain. —*Tennant* v. *Trenchard*, L. R., 4 Ch. App. 546. A trustee who has resold the estate will be ordered to account for the profit of the resale when it exceed the purchase-money and interest thereon.

Where a mortgage is not the ordinary one to secure a loan of money, but is merely an agreement granting the client temporary protection against the enforcing a debt already due to the solicitor, it is not the solicitor's bounden duty to explain to the client that the power of sale is not in the usual form.—*Pooley* v. *Whetham*, 55 L. J. Ch. D. 654.

A being aware that B wished to obtain shares in a certain company represented to B that he A could procure a certain number

of shares at £3 a share. B agreed to purchase at that price and the shares were thereupon transferred to B in part and his nominees in part and he paid to A £3 a share. He afterwards discovered that A was the owner of the shares at the time of sale and that he had bought them at £3 a share. Lord SELBORNE, held that A was the agent for B and ordered him to pay back to B the difference between the prices.—*Kember* v. *Barber*, L. R., 8 Ch. Ap. 56.

Loans to and purchases from the manager of a joint Hindoo family estate and to and from a shebait of a debutter estate are governed by the same principles.—*Konwar Doorganath Roy* v. *Ram Chunder Sen*, I. L. R., 2 Cal. 341. The lender or purchaser is bound to enquire into the necessity of the sale.—*Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree*, 6 M. I. A. 393. In this important case the law was thus stated: "The power of a manager for an infant heir to charge ancestral estate by loan or mortgage is by the Hindu law a limited and qualified power which can only be exercised rightly by a manager in case of need or for the benefit of the estate. But where the charge is one which a prudent owner would make in order to benefit the estate a lender in good faith is not affected by the preceding mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred in the particular instance are the criteria to be observed. If that danger arises from any misconduct to which the lender has been party, he cannot take advantage of his own wrong to support a charge in favour of himself against the heir grounded on a necessity which his own wrong has helped to cause. The lender however in such circumstances is bound to inquire into the necessities of the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager in the particular instance is acting for the benefit of the estate. Every case of such a nature has to be decided upon the merits no less with respect to the burden of proof than with respect to the conduct of the parties."

But such a transaction would only be set aside upon the terms of the plaintiff doing equity that is repaying the money applied towards the liquidation of the debts. A judgment debt and a sale under an execution thereon are only presumptive evidence of the necessity.—*Muddun Thakoor* v. *Kantoo Lall*, L. R., 1 I. A. 333; 14 B. L. R. 187. However under the Mitakshara law a father may sell ancestral property in order to pay off debts which his sons would be obliged by religion to pay after his death. Such a disposition is "unavoidable within the Mitakshara, ch. 1, s. 1, § 28 & 29."—*Girdharee Lall* v. *Kantoo Lall*, 14 B. L. R. 187; L. R., I I. A. 321. "It is a

pious duty on behalf of the son to pay his father's debts and the ancestral property in which the son as son acquires an interest by birth is liable to the father's debts unless they have been contracted for immoral purposes. The Mithila law is the same."—S. C. No creditor of a deceased Mahommetan can follow the assets into the hands of an honest purchaser on mortgagee for value from the heir-at-law. Yet the pendency of a suit by the creditor to obtain payment out of the assets may fix the alienee with notice.—*Syud Bazayet Hossein* v. *Dooli Chund*, I. L. R., 4 Cal. 202.

Where there is a valid contract binding on both vendor and purchaser and at the vendor's death either he has made out his title according to the contract, or the purchaser has accepted the title however bad, the vendor is a trustee for the purchaser. Acceptance by the purchaser after vendor's death is not sufficient. The vendor is not a trustee where the contract is not signed by the purchaser and is not enforceable against him though it be enforceable against the vendor.—*Lysaght* v. *Edwards*, 2 Ch. D. 506.

The leading case of *Reech* v. *Sandford*, (reported select cases in Chancery, 61 presents a good example of a constructive trust. A person being possessed of a lease of the profits of a market devised his estate to a trustee in trust for an infant. Before the expiration of the term, the trustee applied to the lessor for a renewal for the benefit of the infant which he refused in regard that it being only of the profits of a market there could be no distress and must rest simply in covenant which the infant could not do.

There was clear proof of a refusal to renew for the benefit of the infant on which the trustee got a lease made to himself. A bill was brought by the infant to have the lease assigned to him and an account of the profits on this principle that wherever a lease is renewed by a trustee or executor it shall be for the benefit of the *cestui que trust* which principle was agreed on the other side though endeavoured to be differenced on account of the express proof of the refusal to renew to the infant.

Lord Chancellor KING said: "I must consider this as a trust for the infant for I very well see if a trustee on a refusal to renew might have a lease to himself few trust-estates would be renewed to *cestui que use*. Though I do not say there is any fraud in this case yet the trustee should rather have let it run out than have had the lease to himself." This may seem hard, but the trustee is the only person of all mankind who might not have the lease. But it is very proper that rule should be strictly pursued and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use*.

In addition to *Reech* v. *Sandford*, the following examples are noteworthy.

Tenants for life renewing a lease was held trustee for those in remainder.—*Mill* v. *M.*, 3 H. L. R. 828; *Trumper* v. *T.*, 8 L. R., C. A. 870, where a trustee acquiring by Act of Parliament an absolute interest was still held a trustee.—*Cooper* v. *Phibbs*, 2 L. H. L. 409. Where tenant for life paying at request of trustee calls upon shares is to be indemnified.—*Todd* v. *Moorhouse*, 19 L. R. Eq. 69. Where trustee having a mere power to renew were not allowed to purchase reversion under 23 & 24 Vict., c. 124 to prejudice of tenant for life.—*Hayward* v. *Pile*, 5 L. R., C. A. 214, where reversioners to succeed to same interest as tenant for life were entitled only to income.—*Shaddy* v. *Hall*, 3 C. D. 327. Where railway purchasing the land tenant for life was only entitled to interest of purchase-money.—*Wood's Estate*, 10 Eq. 572. Where trust absolutes to renew existed.—*Holker* v. *Burns*, 16 L. R. Eq. 163.

Advantage gained by exercise of undue influence.

89. Where, by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

Commentary.

Two or more persons are said to consent when they agree upon the same thing in the said sense. Consent is said to be free when it is not caused by (1) coercion; that is the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement. It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed. (2) Undue influence; (3) Fraud; (4) Misrepresentation, or (5) Mistake. —Indian Contract Act, 1872, sections 13, 14, 15—22.

The Latin equivalent for coercion is *vis* that for undue influence, fraud and misrepresentation *dolus malus* or simply *dolus*, that for mistake, *error* or *ignorantia*.

Coercion may be practised by a party or by a stranger to the transaction. If practised by a party, the obligation procured thereby is void. If practised by a stranger, and the obligee knew that the

obligor was constrained to the obligation, it is void; if he did not know the obligation might be complete before the exercise of constraint or not. In the former case it will not affect the obligation, in the latter it will furnish ground for a plea to an action to enforce it.

Indian Contract Act, 1872, section 16, gives the following legal definition of undue influence.

"Undue influence is said to be employed in the following cases:—

(1).—When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which but for such confidence or authority he could not have obtained.

(2).—When a person whose mind is enfeebled by old age, illness, or mental or bodily distress is so treated as to make him consent to that, to which but for such treatment he would not have consented although such treatment may not amount to coercion.

A voluntary gift may be made to a friend or relation, who stands not in any confidential relationship, as an attorney. In such a case, unless there is actual fraud, the gift is valid. In *Cooke* v. *Lamotte*, (*a*), however, Sir J. ROMILLY, departing somewhat from the ruling of Lord BROUGHAM in *Hunter* v. *Atkyns* (*b*), considered that the *onus probandi*, that the donor knew what he was doing, lay on the donee, while in confidential relationships the additional *onus* was imposed of showing how the intention of the donor was produced; the Court from the relation inferring the probability of the abuse of the influence. Such are the relations of counsel, religious director, guardian, parent, trustee or attorney.

Religious Director.

The case of the religious director seems to be as old as the days of the scribes and pharisees, who devoured widows' houses. The instances in our law reports are not numerous. One of the most remarkable, as well as most useful, for its clear statement of the law, is *Nottidge* v. *Prince* (*c*). Louisa J. Nottidge, in 1845, went to reside at W., in order to be near the defendant, and to place herself under his religious teachings. The defendant had held two curacies in the Church of England, but had been deprived of his licences on the ground of irregularities, and, subsequently to such deprivation, had become the head of the Agapemone, in which establishment Miss Nottidge

(*a*) 15 Beav. 234.
(*b*) 3 My. & K. 113.
(*c*) J. (60), 1067.

and three of her sisters had become residents. She was taken from the Agapemone, and upon medical certificate placed in a lunatic asylum, but after eighteen months was liberated by the commissioners in lunacy, who certified that she was still of unsound mind on the subject of religion, but had no other indications of insanity; also that her bodily health was giving way, and might be seriously injured by prolonged confinement. The delusion was that the tabernacle of God was upon earth; that the defendant was that tabernacle; and that the spirit of God dwelt in him, his original spirit being extinct. Immediately after her release from the asylum, she returned to the Agapemone, and shortly afterwards transferred a sum of 3*l.* per cent. annuities (the whole of her property) into the defendant's name, but, as alleged by the defendant, without solicitation on his part and without his knowledge.

In delivering his judgment Vice-Chancellor STUART said, "Where a gift is made under the influence of delusion or deception, it cannot be valid. Whether the delusion relates to matters spiritual or matters temporal is immaterial. The strength of religious influence is far beyond that of gratitude to a guardian, trustee or attorney; and the same ground of public utility which requires this Court to guard against such influences has its most important application to that influence which is the strongest. In Roman Catholic countries, where spiritual influence has its highest dominion, public feeling has required the interposition of an absolute and imperative check. The law of France, as stated by M. Pothier, absolutely prohibits not only all gifts by a penitent to his confessor, but all gifts to that religious community of which the confessor is a member."

The decree made was to the effect that the stock be transferred to the plaintiff, as the legal personal representative of Miss Louisa Jane Nottidge, and that all the dividends which had accrued due on it since her death be paid to the plaintiff.

In Metcalfe's Will (*a*), where E. became a nun, and went into a convent in France, and assigned all her property to trustees for the benefit of a Roman Catholic congregation, the Lords Justices held, that she was not *civiliter mortua*, so that she was incapacitated from dealing with her property; and differing herein from the Master of the Rolls, that the relationship did not create a presumption of undue influence, and accordingly that trustees of a will under which she claimed were not justified in paying the fund into Court, but that on her petition payment out was to be made according to her wishes to trustees for the congregation. In the judgment of Lord

(*a*) J. (64), 287.

Justice BRUCE occurs the following passage:—"To say that a lady is not to deal with her property, because, though in the full possession of her senses, she is supposed, and perhaps supposed with great probability, to be under an influence which will direct her to the application of it in a manner which those, who have to adjudicate upon the case, may think unwise,—to suppose therefore that she is not to be trusted with her property is to act with a view of the powers of English Courts of justice which I do not think that they possess. —*Allcard* v. *Skinner*, 36 Ch. D. 145.

Guardian and Ward.

This relationship gives the guardian an advantage over his ward in three ways: (1) In the confidence which a young and unsuspecting person places in apparent integrity; (2) In superior general and special knowledge; (3) In the influence which may be derived from improper indulgence. For each of these reasons, as well as on the ground of public utility, to prevent improper indulgence, purchases and gifts, while the relationship or its influence continues, are set aside. The general doctrine is succinctly summed up by Lord Chancellor ELDON in *Hatch* v. *Hatch* (*a*). "The case proved," said the Lord Chancellor, "the wisdom of the Court in saying it is almost impossible in the course of the connexion of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty."—Griffith's Institutes of Equity, pp. 195—198.

In *Huguenin* v. *Baseley*, ELDON, L. C., said: "It is not upon the feelings which a delicate and honorable man must experience nor upon any notion of discretion in the Court to prevent a voluntary gift by a man stripping himself entirely of his property if undue influence is not imputed that any Chancellor has ever thought himself at liberty to interpose.—14 Vesey, 273. The more modern cases show that the non-reservation to the donor of a power of revocation and the absence of professional advise are usually conclusive proof of undue influence.—14 Vesey, 273.

An account which had been settled between a client who was an old lady and her solicitor including arranged bills of costs was ordered to be opened and the bills of costs taxed after the lapse of two years without actual proof of error or overcharge on the ground that the client had acted under undue influence and without sufficient information and that much of the business charged for was unnecessary and improper.—*Watson* v. *Rodwell*, L. R., 11 Ch. D. 150.

Under a marriage settlement the son of the marriage was entitled to the reversion expectant on the father's life-estate in two sums of

(*a*) Vesey, 292, cited by V. C. S.

money one of which had come from the father's side, the other from the mother's. The son had a large income derived from his grandfather. Shortly after attaining 21, and while residing with the father, but without employing a separate solicitor, he executed a deed giving the reversion in the two sums to his father's second wife and her daughter, and to the father a power to appoint the latter sum to any third wife and her children. Five years after the son left the house and two years after that employed a separate solicitor and then filed a bill to set aside so much of the deed as related to the sum come from the mother's side. HATHERLEY, L. C., held on the facts of the case that though the son understood all the contents of the deed except the power to appoint to a third wife and her children, he was not sufficiently protected from parental influence, but that as the bill had been so long deferred, the deed would only be rectified by striking out the power.—*Turner* v. *Collins*, L. R., 7 C. A. 339.

A voluntary settlement containing no power of revocation made without the advise of an independent solicitor and under the influence of her guardian by a female ward shortly after coming of age was set aside as improvident.—*Everett* v. *Everett*, L. R., 10 Eq. 405; *Clark* v. *Girdwood*, 7 Ch. D. 9.

A solicitor advancing money to a client money on a second mortgage ought not to insert an unusually stringent power of sale without explaining it to the client.—*Cockburn* v. *Edwards*, 18 Ch. D. 449. As between a settlor and his trustees his understanding of clauses inserted in the deed is the question for decision, but as between him and strangers claiming adversely the propriety of the clauses.—*Dutton* v. *Thompson*, 23 Ch. D. 283.

To prevent the operation of the rule that a solicitor shall not take a present from his client while the relation exists there must be not only an absence of fraud and misrepresentation, but also a complete severance of the confidential relation.—*Morgan* v. *Minett*, 6 Ch. D. 638; *Bayley* v. *Williams*, L. R., 1 H. L. 200, has been held not to apply to the case of an agreement to compromise a prosecution for misdemeanor which might have been the subject of a civil remedy.—*Fisher & Co.* v. *Apolinaris Co.*, L. R., 10 Ch. App. 297.

A person taking as a volunteer property acquired by undue influence is in no better position than the person from whom he took and must restore it to the person imposed upon.—*Bainbridge* v. *Brown*, 18 Ch. D. 197. A similar principle applies to renewals of leases by trustees for their own benefit.—*I. R. Morgan*, 18 Ch. D. 93.

The equitable presumption that fraud exists where a gift is made by a person in a fiduciary relation to the other person therein does not apply to gifts by last will and testament.—*Parfitt* v. *Lawless*

L. R., 2 P. & D. 462; *Ashwell* v. *Lorni*, L. R., 2 P. & D. 477. Yet those who take a benefit under a will which they have been instrumental in obtaining have thrown upon them the proof of the righteousness of the transaction.—*Fulton* v. *Andrew*, L. R., 7 H. L. 449; *Hegarty* v. *King*, L. R., 7 Ir. 18. Such a restriction of the presumption is inconsistent.

Where no fiduciary relation exists and where no undue influence is exercised, Equity Courts in England do not set aside a donation by an infant of personal property in his possession.—*Taylor* v. *Johnston*, 19 Ch. D. 603. Cases of undue influence depend upon and vary with the circumstances such as the non-intervention of a disinterested and legal adviser; the age or weakness of disposition of the donor.—*Dutton* v. *Thompson*, 23 Ch. D. 278; the absence of any power of revocation.—*Everett* v. *Everett*, 10 L. R. Eq. 405; and the improvidence of the transaction, *Hall* v. *Hall*, L. R., 8 Ch. App. 430; *Lyon* v. *Home*, was for a time a *cause célebre* in this division of the law. A widow aged 75 within a few days after seeing a charlatan named Home who claimed to be a spiritual medium was persuaded by him that her deceased husband had informed him that she was to adopt him as her son, to transfer £24,000 to him to make her will in his favour to give him a further sum of £5,000 and to settle upon him a reversion of £30,000. She did all this without consideration and without power of revocation. The Court set all the gifts aside.—L. R., 6 Eq. 655.

Advantage gained by qualified owner.

90. Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

Illustrations.

(*a*) A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.

(*b*) A village belongs to a Hindú family. A, one of its members, pays nazrána to Government and thereby procures his name to be entered as the inámdár of the village. A holds the village for the benefit of himself and the other members.

(*c*) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

Commentary.

Not only may there be a conflict of interest and duty in the person making the purchase, there may be also a conflict of ulterior rights in the person becoming entitled to the wrongful gains, thus: A testator bequeathed leaseholds for years determinable upon lives for his widow (who was his residuary legatee and executrix) for life with remainder over. The term expired during the testator's life who continued to hold as tenants from year to year. A subsequent lease obtained by his widow was held to be subject to the trusts of the will as the residue of the term at his death if any however short would have been.

"The question," observed ELDON, L. C., "is as the interest which passed at the testator's death was an interest he could bequeath by a will antecedent to his acquiring it and that interest though but a tenancy from year to year being bequeathed to one for life with remainder to another, if during the tenancy of the person who took for life, acting upon the good will that accompanies possession she gets a more durable term whether the persons who take against her are not entitled to say that term is acquired for her benefit as well as her own. If she had died in his life time, his term from year to year would have passed to the remainderman who would have been specifically entitled to it. The consequence is the term though short is bequeathed in these particular estates and it cannot depend upon the question whether the interest is long or short.—*James* v. *Dean*, 11 Vesey, 383; 13 ibid., 236.

If however the testator had only been tenant-at-will or at sufferance, the widow upon renewal of the lease would not have been trustee for the persons to whom the leasehold were bequeathed in remainder for as a tenancy at will or at sufferance would have determined upon the death of the testator no interest would have passed to them by will. But ELDON, L. C., was inclined to think that had the widow not been residuary legatee, she would in such a case have been a trustee for the residuary legatee. "The question," he re-

marked, "is new whether an executrix dealing with the opportunities which she derives from her succession without title to the estate a tenant by sufferance or at will had held is a trustee for a person who cannot say that he took an interest under the will or whether it is to be said against her only that the advantage she made of these opportunities should be for the general estate. The result is this. I think it impossible she could hold it for herself. Not applying to this case, but supposing another person not the wife was residuary legatee the question, I should think, would be in favour of that other residuary legatee being a casual advantage from the dealing of the executrix.—11 Vesey, 392. Ranelagh's Will, 26 Ch. D. 591.

We give a form of inquiry as to renewed leases decreed by the English Chancery: "And let an inquiry be made what renewals have been made of the testator's leasehold estates respectively and when and by whom and out of what funds the fines, fees, and expenses attending such renewal and each of them have been paid. And declare that the defendant B, as tenant for life of the said estates ought to contribute to such renewals and to the fines, fees, and expenses attending the same in proportion to such benefit as he has derived or may derive from such renewals and every or any of them (2). And let an inquiry be made what sum ought to be paid or secured by the defendant, in respect of such his proportion, and what security he ought to give in respect thereof, but this direction as to such security is to be without prejudice to the question whether the defendant may not ultimately be liable to pay more or less than the sum for which it shall be certified that such security ought to be given."—13th May 1846, A. 1429.

Trustees of land affecting actual ownership acquired from the crown the right of fishing in the adjacent seas. The House of Lords, held that the acquisition was secured for the benefit of the beneficiaries.—*Aberdeen Town Council* v. *Aberdeen University*, 2 App. Ca. 544.

A trustee or any person holding a fiduciary relation, who has acquired the legal possession and ownership of an estate subject to a covenant for perpetual renewal and deals with the property so as to make the renewal impossible by his own act and for his own benefit, must give full effect to the charges upon the trust estate and satisfy those charges out of the acquired estate so far as may be necessary.—*Trumper* v. *Trumper*, L. R., 8 Ch. App. 870.

Property acquired with notice of existing contract.

91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must

hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Commentary.

Except as otherwise provided in Chapter II of the Specific Relief Act, 1877 the specific performance of a contract may be enforced in the discretion of the Court.

(*a*) When the act agreed to be done is in the performance wholly or partly of a trust.

(*b*) When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done.

(*c*) When the act agreed to be done, is such that pecuniary compensation for its non-performance would not afford adequate relief.

(*d*) When it is probable that pecuniary compensation cannot be got for, the non-performance of the act agreed to be done.

Explanation.—Unless and until the contrary is proved, the Court shall presume that a breach of contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be relieved. Section 12. See also Sections 13 to 30, and Griffith's Institutes of Equity.

Purchase by person contracting to buy property to be held on trust.

92. Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

Commentary.

The doctrines does not rest on the name of a trustee, or on the legal or equitable relation of trustee, but on the familiar intercourse between the parties.

Advantage secretly gained by one of several compounding creditors.

93. Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

Constructive trusts in cases not expressly provided for.

Illustrations.

(*a*) A, an executor, distributes the assets of his testator B to the legatees without having paid the whole of B's debts. The legatees hold for the benefit of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(*b*) A by mistake assumes the character of a trustee for B, and under colour of the trust receives certain moneys. B may compel him to account for such moneys.

(*c*) A makes a gift of a lákh of rupees to B, reserving to himself, with B's assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000, and B holds that sum for the benefit of A.

Commentary.

Dealing with an expectant for the purchase of his interest as with a young man a few days before attaining his majority without professional advice in furtherance of an arrangement made with his father during the infancy throws upon the purchaser the *onus* of showing that the bargain was not unconscientious. Then the transaction will not be set aside though subsequently from defect or accident the price turn out inadequate. The Judges differed as to the inference to be deduced from the fact that the poverty of the infant rendered it impracticable for him to obtain independent advice.—*O'Rorke* v. *Bolinbroke*, 2 App. Cas. 814.

He who seeks equity must do equity, is the maxim enforced by equity when granting relief in such case.—Griffith's Institutes of Equity. The latter equity is to repay the advances with simple interest at £5 per centum.—*Aylesford* v. *Morris*, L. R., 8 Ch. App. 484.

The doctrine of *Chesterfield* v. *Janssen*, 2 Ves., 124 includes not only heirs and expectant heirs, but also all remaindermen and reversioners of the whole or part of a family property.—JESSEL, M. R.—*Benyon* v.

Cook, L. R., 10 Ch. App. n. 391. The sale of a small proportion of property in possession the bulk being reversionary will not prevent the application of the rule.—*Webster* v. *Cook*, L. R., 2 Ch. App. 542; *Tyler* v. *Yates*, L. R., 11 Eq. 276. In the former case the life-interest was subject to rent charges which consumed nearly the whole of the income. In the latter a young man charged a reversion with exorbitant sums for interest on loans to his brother an infant for whom he had accepted several promissory notes. STUART, V. C. held that the charges should stand as securities for the sums advanced with interest at £5 per centum. This decision was affirmed by HATHERLEY, L. C.—L. R., 6 C. A. 665.

In *Aylesford* v. *Morris*, L. R., 8 Ch. Ap. 492. SELBORNE, L. C., alluding to the observations of Lord HARDWICKE upon catching bargains with heirs expectants and reversioners, remarked that "whatever weight there might be in any such collateral considerations, they could hardly prevail if they did not connect themselves with an equity more strictly and directly personal to the plaintiff in each particular case for the real truth is that the ordinary effect of all the circumstances by which these considerations are introduced is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness, and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it.

Seeing that a vendor's lien for unpaid purchase-money is not an express trust, his right to recover it may be barred by a statute of limitations.—*Toft* v. *Stephenson*, 7 Hare, 1.

Where a vendor covenants for a security and not for a stipulated sum, or where the note bond covenant or annuity is not in addition to purchase-money but a substitution for it, there is no vendor's lien. A leasehold brickfield was assigned to a company in consideration of £6,000 to be paid for by 50 per cent. of all monies received upon shares and by 50 per cent. of all monies borrowed until the sum of £6,000 had been made up. "The vendor," said JAMES, L. J., "got for his money a charge upon and a right to the capital of the company to the extent of £6,000, when it came in; and intended to rely on that fund for payment and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to mortgage its property.—*I. R. Brentwood Brick and Coal Company*, 4 Ch. D. 405.

When the vendor of an estate in fee died intestate before the payment of the purchase-money or his conveyance, his heir-at-law will

be trustee for his legal personal representatives and bound to convey accordingly.—Griffith's Institutes of Equity. He is not however a bare trustee owing to the lien.—*Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582.

When the vendee of an estate has a lien thereon for prematurely paid purchase-money, his sub-vendee having also prematurely paid the whole or part will likewise have a lien on the rescission of the original contract.— *Aberaman Ironworks* v. *Wickens*, L. R., 4 Ch. Ap. 101. A trustee purchasing an estate with his own and with trust funds will have a lien but subject to the trust-money paid.—*Worester City and County Banking Company* v. *Blick*, 22 Ch. D. 255.

A trustee executed a settlement declaring the trusts of a sum of £2,000 which was recited to have been paid to him by the settlor—a married woman. The recital was untrue, and the trustee had executed on the faith of a promise that the settlor would pay him the sum out of the separate estate. It never was paid. JESSEL, M. R., held that neither the trustee nor a volunteer under the settlement could enforce it.—*Marker* v. *Thomas*, L. R., 17 Eq., 8; *Pownall* v. *Anderson*, 2 Jurist, N. S. 857.

Although collaterals may not be able to enforce the trusts of a marriage settlement when executory the trustees of a fund held on an executed trust cannot part with it as against the collaterals at the instance of the husband and wife and her debtors although all other trusts may have failed.—*Paul* v. *Paul*, 20 Ch. D. 742; *In re Flavell*, 25 Ch. D. 89.

The Transfer of Property Act, 1882, s. 53 avoids fraudulent transfers made to defraud creditors and others under certain circumstances. In the territories to which the said Act does not extend a similar result may arise from the operation of 13 Eliz. c. 5 and 27 Eliz. c. 4.

Obligor's duties, liabilities and disabilities.

95. The person holding property in accordance with any of the preceding sections of this chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Provided that (*a*) where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble

skill and loss of time in such cultivation or employment; and (*b*) where he holds the property by virtue of a contract with the person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof.

Saving of rights of *bonâ fide* purchasers.

96. Nothing contained in this chapter shall impair the rights of transferees in good faith for consideration, or create an obligation in evasion of any law for the time being in force.

Commentary.

B having been sentenced to transportation for life presented a petition in the revenue Court in which stating that he owned a certain zamindari estate, that he had been so sentenced, that it was necessary to make arrangements for the payment of the revenue due to Government and the management of the estate he prayed that his name might be removed from the revenue registers and that of P be recorded in its stead. P sold the property for valuable consideration, his vendee purchasing without notice of any trust and it was subsequently put up for sale in execution of a decree against P's vendee and was purchased without notice of any trust. STUART, C. J., and STRAIGHT, J., held, that the transfer of property by B to P was in the nature of a trust, but that it could not be followed into the hands of the auction purchaser.—*Hait Ram* v. *Durga Prasad*, I. L. R., 5 A. S. 603.

A trustee alleging that the trust property consisting of land was his own property mortgaged it. The mortgagee took it in good faith for valuable consideration and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of the decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties. STRAIGHT and BRODHURST, JJ., held, that the plaintiff was estopped, and that it was too inequitable to oust the defendant from land on the strength of a title directly antagonistic to the plaintiff's original representations.—*Gubyar Ali* v. *Fida Ali*, I. L. R., 6 A. S. 24.

THE SCHEDULE.

STATUTE.

Year and chapter.	Short title.	Extent of repeal.
29 Car. II, c. 3 ...	The Statute of Frauds.	Sections 7, 8, 9, 10 and 11

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Short title.	Extent of repeal.
XXVIII of 1866. ...	The Trustees' & Mortgagees' Powers Act, 1866.	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36, and 37. In sections 39 and 43 the word "trust" wherever it occurs; and in section 43 the words "management or" and "the trust-property or,"
I of 1877 ...	The Specific Relief Act, 1877.	In section 12 the first illustration.

R. J. CROSTHWAITE,
Offg. Secy. to the Govt. of India.

APPENDIX.

OFFICIAL TRUSTEE ACT,

No. XVII of 1864.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 24TH MARCH 1864.

An Act to constitute an Office of Official Trustee.

Preamble.

WHEREAS it is expedient to amend the law relating to Official Trustees, and to constitute an Office of Official Trustee; It is enacted as follows:—

Interpretation.

1. The following words and expressions in this Act shall have the meanings hereby assigned to them unless there be something in the context repugnant to such construction, that is to say:—

"High Court."

The expression "High Court" shall mean Her Majesty's High Courts of Judicature at Fort William in Bengal, Fort Saint George, and Bombay respectively in the exercise of their original Civil jurisdiction.

"Chief Justice."

The expression "Chief Justice" shall mean the Chief Justice or Acting Chief Justice for the time being of any of the said High Courts.

"Person."

The word "person" shall include a corporation.

Number.

Words importing the singular number shall include the plural, and words importing the plural number shall include the singular.

Gender.

Words importing the masculine gender shall include females.

2. *This section is repealed by Act No. XIV of* 1870.

3. Every Official Trustee appointed under the said Act XVII of 1843 shall, save as regards the remuneration to be received by him, hold and execute the Trusts of which he is Trustee in all respects as if he were an Official Trustee appointed under this Act.

Official Trustee under Act XVII of 1843 to act as if appointed under this Act, save as regards remuneration.

4. In each of the Presidencies of Fort William in Bengal, Fort St. George, and Bombay, there shall be an Official Trustee. The said Official Trustees shall be called the Official Trustee of Bengal, the Official Trustee of Madras, and the Official Trustee of Bombay respectively.

An Official Trustee to be appointed in each Presidency.

5. Every Official Trustee appointed under this Act shall be appointed and may be suspended or removed from his office by the authorities hereinafter named, that is to say—

Appointment, suspension and removal of Official Trustees.

The Official Trustee of Bengal by the Chief Justice of Her Majesty's High Court of Judicature at Fort William in Bengal.

The Official Trustee of Madras by the Chief Justice of Her Majesty's High Court of Judicature at Fort St. George.

The Official Trustee of Bombay by the Chief Justice of Her Majesty's High Court of Judicature at Bombay.

6. The Administrator-General or Officiating Administrator-General for the time being of any of the said Presidencies shall be eligible for the Office of Official Trustee of that Presidency. Every Official Trustee appointed under this Act shall give security for the due execution of the duties of his Office in such manner and to such amount as the Chief Justice by whom he is appointed shall direct.

Administrator-General may be appointed Official Trustee.

Security to be given by Official Trustee.

7. It shall be lawful for the Chief Justice of the High Court at any of the Presidencies, from time to time, to grant leave of absence to the Official Trustee of that Presidency, but subject always to such and the like rules as may be for the time being in force as to leave of absence of the Officers attached to such

Leave of absence of Official Trustee, and appointment of a person to officiate for him.

High Court. Whenever any Official Trustee shall obtain leave of absence, it shall be lawful for the Chief Justice to appoint some person to officiate as Official Trustee, and such person while so officiating shall be subject to the same conditions and be bound by the same responsibilities as the Official Trustee, and he shall be deemed to be the Official Trustee for the time being under this Act and shall be liable to give security for the due execution of the duties of his Office in like manner as if he had been appointed Official Trustee.

Official Trustee may, with his consent, be appointed Trustee of a settlement by grantor, &c.

8. If any person shall be about to grant, assign, or settle any property moveable or immoveable, of what nature or kindsoever, upon or subject to any Trust, whether for a charitable purpose or otherwise, it shall be lawful for such person, with the consent of the Official Trustee, to appoint him, by the deed creating the Trust, to be the Trustee of such settlement; and upon such appointment the property so granted, assigned, or settled shall vest in such Officer and his successors in Office, and shall be held by him and then upon the Trust declared and contained in the said deed. Provided always that the consent of the Official Trustee shall be recited in the said deed, and that the deed shall be duly executed by the Official Trustee: provided also that no Trust for any religious purpose shall ever be held by the Official Trustee, under this or under any other section of this Act.

Official Trustee appointed under last preceding section, to receive only the remuneration specified in the deed.

9. Every Official Trustee appointed Trustee of any property under the last preceding section, shall be entitled to receive by way of remuneration in that behalf such sum or sums only as he shall by the deed of settlement be declared to be entitled to receive.

Under what other circumstances Official Trustee may be appointed Trustee of any property.

10. If any property is subject to a Trust, whether for a charitable purpose or otherwise, and there shall be no Trustee willing to act or capable of acting in the Trusts thereof, who is within the local limits of the ordinary or extraordinary original civil jurisdiction of the High Court, or if property is subject to a Trust, and all the Trustees, or the surviving or continuing Trustee and all the persons beneficially interested in the said Trust, shall be desirous that the Official Trustee shall be appointed in the room of such Trustees or Trustee, then and

in any such case it shall be lawful for the High Court on petition, and with the consent of the Official Trustee, to appoint the Official Trustee to be the Trustee of such property: and upon such appointment such property shall vest in the Official Trustee and his successors in Office, and shall be held by him and them upon the same Trusts as the same were held previous to such appointment.

Rate of commission under last preceding section.

11. The Official Trustee shall be entitled by way of remuneration, in respect of all Trust property transferred to him under the last preceding section, to a commission the rate of which shall be as follows, that is to say,—

On all capital monies received by him, a commission of one half per cent. on receiving the same.

On all capital monies invested by him, a commission of one half per cent. on investing the same.

On all sums received by him by way of interest or dividends in respect of monies invested, a commission of three quarters per cent.

On all rents collected by him, a commission of two and a half per cent.

What expenses, &c., commission to cover.

12. The Official Trustee shall defray all the expenses of the establishment necessary for his Office, including the provision of Office accommodation together with all other charges to which the said Office shall be subject, except those for which express provision is made by this Act, and except those costs of litigation and the like which a Trustee would, under ordinary circumstances, be entitled to pay for out of the Trust monies in his hand. The commission to which the Official Trustee shall be entitled, is intended to cover all the expenses and risk and responsibility of management, collection and distribution.

In all cases Official Trustee to be sole Trustee.

13. It shall in no case be lawful to appoint the Official Trustee to be a Trustee along with any other person: but the Official Trustee shall always be sole Trustee.

In what securities Official Trus-

14. The Official Trustee shall cause all capital monies received by him to be invested in Government securities, or otherwise as the Court shall direct: and if in

tee to invest Trust money.

any case the Trust funds or any part of them shall at the time of their vesting in the Official Trustee be invested otherwise than as provided in the deed or Will creating the Trust or than as ordered by the Court, it shall be the duty of the Official Trustee, as soon as he reasonably can, to realize the funds so improperly invested, and to invest the same in Government securities or otherwise as the Court shall direct.

High Court may make orders respecting Trust property vested in Official Trustee.

15. The High Court may make any such orders as shall seem to it necessary respecting any Trust property vested in the Official Trustee, or the interest or Produce thereof. All such orders shall be made on petition, unless the Court shall direct a suit to be instituted.

Re-transfer of Trust property to original, or transfer to other, Trustee.

16. Nothing in this Act shall prevent the re-transfer of any Trust property which may have become vested in the Official Trustee, to the original or any subsequently appointed Trustee, or to such person as the Court shall direct, unless otherwise provided by the deed or Will creating the Trust.

Order of appointment of Official Trustee.

17. All orders which shall be made appointing any Official Trustee to act as Trustee in virtue of his Office, shall appoint him by his name of Office and shall authorize the Official Trustee for the time being of the same Presidency to act as Official Trustee of the property to which such order shall relate: and all property and interests which at the time of the death, resignation, or removal from Office of any Official Trustee shall be vested in him by virtue of such order shall upon such death, resignation, or removal cease to be vested in him, and shall vest in his successor in Office immediately upon his appointment thereto, and all books, papers, and documents kept by such Official Trustee by virtue of his Office shall be transferred to and vested in his successor in Office.

On death, &c., of Official Trustee, property to vest in his successor.

Official Trustee to sue or be sued by his name of Office. Suit not to abate by death, &c.

18. All actions, suits, or other proceedings which shall be commenced by or against any Official Trustee in his official character, may be brought by or against him by his name of Office, and no suit, action, or other proceeding already commenced

or which shall be commenced by or against any person as Official Trustee either alone or jointly with any other person, shall abate by reason of the death, resignation, or removal from Office of any such Official Trustee, but the same may by order of the Court and upon such terms as to the service of notices or otherwise as the Court may direct, be continued against his successor immediately upon his appointment, in the same manner as if no such death, resignation, or removal had occurred. Provided that nothing herein contained shall render any such successor personally liable for any costs incurred prior to the order for continuing the action or suit against him, or shall release an Official Trustee who has resigned or been removed from his office, or the heirs, executors, administrators or representatives of a deceased Official Trustee from being liable for any such costs.

Proviso.

19. Every Official Trustee appointed under this Act shall enter into books, to be kept by him for that purpose, separate and distinct accounts of each Trust of which he is the Trustee, and of all such sums of money and securities for money, goods, and things, as shall come to his hands, or to the hands of any person employed by him, or in Trust for him, under this Act, and likewise of all payments made by him on account of such Trust, and of all debts due by or to the same, specifying the dates of such receipts and payments respectively, which said books shall be kept in the Official Trustee's Office, and shall be at all times open for the inspection of the Chief Justice and of any person authorized by him to demand inspection thereof.

Official Trustee to keep a separate account of each Trust, to be open to the inspection of the Chief Justice, and of any person authorized by him to demand inspection.

20. The Chief Justice shall have power, from time to time, to make and alter any general rules and orders consistently with the provisions of this Act, for the safe custody of the Trust Funds and securities which shall come to the hands or possession of the Official Trustee, and for the remittance to Europe or elsewhere of all sums of money which shall be payable or belong to persons resident in Europe or elsewhere, or in other cases where such remittances shall be required, and generally for the guidance and Government of the Official Trustee in the discharge of his duties; and may by such rules

Chief Justice may make and alter rules and orders for custody of Trust Funds, &c.

and orders, amongst other things, direct what books, accounts, and statements in addition to those mentioned in this Act, shall be kept by the Official Trustee, and in what form the same shall be kept, and what entries the same shall contain, and where the same shall be kept, and where and how the funds and securities and other the property belonging to the Trust of which the Official Trustee is the Trustee shall be kept or invested or deposited, and how any remittances thereof shall be made.

Publication of orders, &c.

21. Such orders shall be published in the Official Gazette, and it shall be the duty of the several Official Trustees to obey and fulfil the same, and the same shall be a full authority and indemnity for all persons acting in pursuance thereof.

Official Trustee to furnish annual Schedules which shall be filed in the High Court.

22. The Official Trustee of each of the said Presidencies shall once in every year, that is to say, on the first day of March, or on such other day as the Chief Justice shall direct, deliver to the Chief Justice a true Schedule showing the gross amount of all sums of money received or paid by him on account of each Trust of which he is the Trustee, and the balances during the year ending on the thirty-first day of December next before the day of delivering such Schedule, and a true list of all securities received on account of each of the said Trusts during the same period; and also a true Schedule of all Trusts which shall have come to an end or of which the Official Trustee shall have ceased to be the Trustee and the property subject to which shall have been paid or made over to the persons entitled to the same or to new Trustees during the same period, specifying the nature and amount or value of such property and the persons to whom paid or made over. The Chief Justice shall cause the said Schedules to be filed as record in the High Court; but it shall not be lawful for any person to inspect the same or to make copies thereof or of any part thereof, except on an order granted by the Chief Justice permitting him so to do.

Inspection of Schedules so filed.

Chief Justice to appoint Auditors.

23. The Chief Justice shall from time to time appoint an Auditor or Auditors to examine the accounts of the Official Trustee at the time of the deliv-

ery of the said Schedules and also at any other time when the Chief Justice shall think fit.

Auditors to examine Schedules and accounts of Official Trustee and to report to Chief Justice.

24. The Auditor or Auditors shall examine the Schedules and accounts, and report to the Chief Justice whether they contain a full and true account of every thing which ought to be inserted therein, and whether the books which by this Act are, or which by any such general rules and orders as aforesaid shall be directed to be kept by the Official Trustee, have been duly and regularly kept, and whether the Trust Funds and securities have been duly kept and invested and deposited in the manner prescribed by this Act or which shall be prescribed by any such rules and orders to be made as aforesaid.

Auditors to have power to summon witnesses and to call for books, &c.

25. Every Auditor shall have power to summon as well the Official Trustee as any other person or persons whose presence he may think necessary, to attend him from time to time; and to examine the Official Trustee or other party or parties, if he shall think fit, on oath or solemn affirmation, to be by him administered; and to call for all books, papers, vouchers, and documents, which shall appear to him to be necessary for the purposes of the said reference; and if the Official Trustee or other person or persons when summoned shall refuse, or, without reasonable cause, neglect to attend or to produce any book, paper, voucher, or document required, or shall attend and refuse to be sworn or make a solemn affirmation, when by law an affirmation may be substituted for an oath, or shall refuse to be examined, the Auditor or Auditors shall certify such neglect or refusal in writing to the High Court; and every person so refusing or neglecting shall thereupon be punishable, in like manner as if such refusal or neglect had been in contempt of the said High Court.

Penalty for refusal or neglect to attend, &c., to produce books, &c.

Costs of preparing Schedules, &c. how to be paid.

26. The costs and expenses of preparing the said Schedules and accounts and of every such reference and examination as aforesaid, shall be defrayed by all the Trust estates to which such Schedules or accounts shall relate, which costs and expenses, and the portion thereof to be contributed by each of the said Trust estates, shall be ascertained and settled by the Auditor or Auditors, subject

to the approval of the Chief Justice, and shall be paid out of the said estates accordingly by the Official Trustee.

Matters to be reported by Auditors.

27. If upon any such reference and examination the Auditor or Auditors shall see reason to believe that the said Schedules do not contain a true and correct account of the matters therein contained, or which ought to be therein contained, or that the Trust Funds and securities have not been duly kept and invested or deposited in the manner directed by this Act, or which shall be directed by any such rules and orders as aforesaid, or that the Official Trustee has failed to comply with the provisions and directions of this Act or of any such rules and orders, he or they shall report accordingly to the Chief Justice.

Proceedings upon such report.

28. The Chief Justice may refer every such report as last aforesaid to the consideration of the Advocate-General for the Presidency, who shall thereupon, if he shall think fit, proceed summarily against the defaulter or his personal representative in the High Court by petition for an account, or to compel obedience to this Act or to such rules and orders as aforesaid, or otherwise as he may think fit, in respect of all or any of the Trust estates then or formerly under the charge of such defaulter; and the Court shall have power, upon any such petition, to compel the attendance in Court of the defendant or defendants, and any witnesses who may be thought necessary, and to examine them orally or otherwise as the said Court shall think fit, and to make and enforce such order or orders as the Court shall think just.

Costs upon such proceedings, &c. how to be defrayed.

29. The costs, including those of the Advocate-General, and of the reference to him, if the same shall be directed by the Court to be paid, shall be defrayed either by the defendant or defendants, or out of the Trust estates rateably as the said Court shall direct; and whenever any costs shall be recovered from the defendant or defendants, the same shall be repaid to the estates by which the same shall have been in the first instance contributed, and the Court shall have power to order the Official Trustee or other person or persons, defendants, to receive his or her costs out of the said estates, if it shall think fit.

Orders of the High Court to have same effect, and to be executed in the same manner, as decrees.

30. Any orders which shall be made by any of the said High Courts shall have the same effect and be executed in the same manner as decrees.

Who may apply for order under this Act.

31. Any order under this Act may be made on the application of any person beneficially interested in any Trust property, or of any Trustee thereof, whether under disability or not.

Executor or Administrator may, by leave of the High Court, pay to Official Trustee, legacy, share, &c., to which an infant or lunatic is entitled.

32. If any infant or lunatic shall be entitled to any gift or legacy or residue or share thereof, it shall be lawful for the Executor or Administrator by whom such legacy, residue, or share may be payable or transferable, or the party by whom such gift may be made, or any Trustee of such gift, legacy, residue, or share, to pay or transfer the same to the Official Trustee appointed under this Act; provided that the leave of the High Court to make such payment or transfer shall be first obtained by motion made on petition. Any money or property paid or transferred to the Official Trustee or vested in him under this section shall be subject to the same provisions as are contained in this Act as to other property vested in such Official Trustee under the provisions thereof.

THE INDIAN TRUSTEE ACT, 1866.

No. XXVII of 1866.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 24TH OCTOBER 1866.

An Act to consolidate and amend the Law relating to the conveyance and transfer of property in British India vested in Mortgagees and Trustees, in cases to which English Law is applicable.

WHEREAS it is expedient to consolidate and amend the laws relating to the conveyance and transfer of moveable and immoveable property in British India vested in mortgages and trustees, in cases to which English Law is applicable; It is hereby enacted as follows:—

Preamble.

(*a*) The provisions of this Act have been extended to Hindoos *in re* Kahandas Narrandas, I. L. R., 5 B. 154.

(*b*) This Act extends only to the Lower Provinces, the North-Western Provinces, the Presidencies of Madras and Bombay and the Punjab. It is mainly founded on the Statutes 13 & 14 Victoria, c. 60, and 15 & 16 Victoria, c. 55.

1. [*This section is repealed by Act No. XIV of* 1870.]

Interpretation clause.

2. In this Act, unless there be something repugnant in the subject or context—

"Immoveable property."

"Immoveable property" shall extend to and include messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

"Stock."

"Stock" shall mean any fund, annuity or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any

share[a] or interest therein. It shall also include shares in ships registered under the Merchant Shipping Act, 1854, or at any port in British India:[b]

"Hold" and "Holding" shall be applicable to any vested estate, whether for life or of a greater or less description, in possession, futurity or expectancy, in any immoveable property:

"Hold" and "Holding."

"Contingent right" as applied to immoveable property shall mean a contingent or executory interest, or possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent:

"Contingent right."

"Convey" and "Conveyance" applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another immoveable property which such person holds, or in which he is entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of Act XXXI of 1854 (*to simplify the modes of conveying land in cases to which the English law is applicable*):

"Convey" "Conveyance."

"Transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock or Government securities can transfer such stock or Government securities from himself to another.

"Transfer."

"High Court" shall mean every Court now or hereafter established under the Statute 24 & 25 Vict., c. 104, and also the Chief Court of the Panjáb or such one or more Judges of the said Courts respectively as shall be appointed by the Chief Justice or the senior Judge,[c] as the case may be, to entertain applications and make orders under this Act:

"High Court."

---

[a] *Re Angelo*, 5 DeG. & S. 278. [b] 18 & 19 Vic., c. 91, s. 10.
[c] See Act No. IV of 1866, s. 3.

"Trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words "Trust" and "Trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person:

"Trust" "Trustee."

"Lunatic" shall mean any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs:

"Lunatic."

"Person of unsound mind" shall mean any person not a minor who, not having been found to be lunatic, shall be incapable from infirmity of mind to manage his own affairs:

"Person of unsound mind."

In the case of a will made or an intestacy occurring before the first day of January 1866,[a] "Heir" shall mean the person claiming an interest in the immoveable property of a deceased person under the laws concerning descent applicable to such property: and "Devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immoveable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

"Heir" and "Devisee."

In the case of a will made or an intestacy occurring on or after the first day of January 1866,[a] "Heir" shall mean any person claiming an interest in the immoveable property of a deceased person under the rules for the distribution of an intestate's estate; and "Devisee" shall mean any person taking immoveable property under a bequest, and any person, other than an executor or administrator, claiming an interest in immoveable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession:

[a] The day on which the Indian Succession Act (X of 1865) came into force.

"Mortgage" shall be applicable to every estate or interest in immoveable or moveable property which would in the High Court be deemed merely a security for money:

"Mortgage."

"Person" shall include any company or association, or body of persons whether incorporated or not:

"Person."

Words importing the singular number only shall extend to several persons or things; words importing the plural number shall apply to one person or thing; words importing the masculine gender shall extend to a female.[a]

Number. Gender.

3. The powers and authorities given by this Act to the High Courts shall and may be exercised only in cases to which English law is applicable, and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said Courts respectively.

High Court to have jurisdiction in what cases.

4. When any lunatic or person of unsound mind shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order that such property be vested in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been same, and had duly executed a conveyance of the property in the same manner for the same estate[b]

High Court may convey estates of lunatic-trustees and mortgagees;

5. When any lunatic or person of unsound mind shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said High Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been same, and had duly executed a deed so releasing or disposing of the contingent right.[c]

and may convey contingent rights.

---

a 13 & 14 Vic., c. 60, s. 2. *b* 13 & 14 Vic., c. 60, s. 3.
c 13 & 14 Vic., c. 60, s. 4.

6. When any lunatic or person of unsound mind shall be solely entitled to any stock or Government securities, or to any thing in action upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof:

High Court may transfer stock of Government securities of lunatic-trustees and mortgagees.

and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or Government securities, or thing in action, upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said High Court may appoint.[a]

7. When any stock or Government securities shall be standing in the name of any deceased person whose executor or administrator is a lunatic or person of unsound mind, or when any thing in action shall be vested in any lunatic or person of unsound mind as the executor or administrator of a deceased person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.[b]

Power to transfer stock or Government securities of deceased persons.

8. Whenever any minor[c] shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the minor

High Court may convey estates of minor-trustees and mortgagees.

---

a 13 & 14 Vic., c. 60, s. 5. b 13 & 14 Vic., c. 60, s. 6.
c See Act No. IX of 1875.

trustee or mortgagee had attained his majority, and had duly executed a conveyance of the property in the same manner for the same estate.[a]

Contingent rights of minor-trustees and mortgagees.

9. When any minor shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the minor had attained his majority, and had duly executed a deed so releasing or disposing of the contingent right.[b]

High Court may convey estate of trustee out of jurisdiction of Court.

10. When any person solely holding any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance of the property in the same manner and for the same estate.[c]

High Court may make order where persons hold immoveable property in trust jointly with persons out of jurisdiction.

11. When any person or persons shall hold any immoveable property in trust jointly with a person not within the jurisdiction of the High Court, or who cannot be found, it shall be lawful for the said Court to make an order vesting the property in the person or persons so jointly holding, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance of the property in the same manner for the same estate.[d]

Contingent rights of trustees.

12. When any person solely entitled to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High

---

a 13 & 14 Vic., c. 60, s. 7.
b 13 & 14 Vic., c. 60, s. 8.
c 13 & 14 Vic., c. 60, s. 9.
d 13 & 14 Vic., c. 60, s. 10.

Court, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.[a]

High Court may make order where persons jointly entitled with others out of jurisdiction to contingent right in immoveable property.

13. When any person jointly entitled with any other person or persons to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.[b]

When uncertain which of several trustees survived.

14. Where there shall have been two or more persons jointly holding any immoveable property upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance of the property in the same manner for the same estate.[c]

When uncertain whether last trustee living or dead.

15. Where any one or more person or persons shall have held any immoveable property upon any trust, and it shall not be known, as to the trustee last known to have held such property, whether he be living or dead, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the last

---

a 13 & 14 Vic., c. 60, s. 11. *b* 13 & 14 Vic., c. 60, s. 12.
c 13 & 14 Vic., c. 60, s. 13.

trustee had duly executed a conveyance of the property in the same manner for the same estate.[a]

When trustee dies without heir.

16. When any person holding any immoveable property upon any trust shall have died intestate as to such property without an heir, or shall have died, and it shall not be known who is his heir or devisee, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the property in the same manner for the same estate.[b]

Contingent right of unborn trustee.

17. When any immoveable property is subject to a contingent right in an unborn person, or class of unborn persons, who, upon coming into existence, would in respect thereof hold such property upon any trust, it shall be lawful for the High Court to make an order which shall wholly release and discharge such property from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would, upon coming into existence, hold in such property.[c]

Power to make order for vesting estate on refusal or neglect of trustee to convey or release.

18. In every case where any person holds or shall hold jointly or solely any immoveable property, or is or shall be entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance of such property, or a duly authorized agent of such last mentioned person, requiring such trustee to convey the same, or to release such contingent right, it shall be lawful for the High Court, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey the said property for the space of twenty-eight days after such demand, to make an order vesting such property in such person or persons, in such manner and for such estate, as the Court shall direct, or releasing such contingent right in such manner

---

a 13 & 14 Vic., c. 60, s. 14. *b* 13 & 14 Vic., c. 60, s. 15.
c 13 & 14 Vic., c. 60, s. 16.

as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance of the property, or a release of such right, in the same manner and for the same estate.[a]

Power to convey in place of mortgagee.

19. When any person to whom any immoveable property has been conveyed by way of mortgage, shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the re-conveyance or vesting of such property, then in any of the following cases, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct, that is to say,—

when an heir or devisee of such mortgagee shall be out of the jurisdiction of the High Court, or cannot be found:

when an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such property, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such property shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person:

when it shall be uncertain which of several devisees, of such mortgagee was the survivor:

when it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead:

when such mortgagee shall have died intestate as to such property and without an heir, or shall have died, and it shall not be known who is his heir or devisee:

And the order of the said High Court made in any one of the foregoing cases, shall have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly

---

[a] 15 & 16 Vic., c. 55, s. 2.

executed a conveyance of the property in the same manner and for the same estate.[a]

Power to appoint person to convey in certain cases.

20. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient, to make an order appointing a person to convey such property, or release or dispose of such contingent right:

and the conveyance, or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act.

In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any company or society established or to be established; it shall also be lawful for the High Court, if it be deemed more convenient, to make an order directing the secretary or any officer of such company or society at once to transfer or join in transferring the stock to the person or persons to be named in the order:

and this Act shall be a full and complete indemnity and discharge to all companies or societies and their officers and servants for all acts done or permitted to be done pursuant thereto.[b]

When trustees of stock or Government securities joined with trustees out of jurisdiction.

21. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the High Court, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or Government securities or thing in action upon any trust it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends,

---

[a] 13 & 14 Vic., c. 60, s. 19. [b] 13 & 14 Vic., c. 60, s. 20.

interest or income thereof, or to sue for or recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint.

When any sole trustee of any stock, Government securities, or thing in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.[a]

When trustee of stock, &c., refuses to transfer.

22. Where any sole trustee of any stock, Government securities, or thing in action, shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for or recover such thing in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the High Court to make an order vesting the sole right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.[b]

Where one of several trustees of stock, &c., refuses to transfer or receive and pay over dividends.

23. Where any one of the trustees of any stock, Government securities, or thing in action, shall neglect or refuse to transfer such stock, or Government securities, or to receive the dividends, interest or income thereof, or to sue for or recover such thing in action according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by such person, it shall be lawful for the

---

a 13 & 14 Vic., c. 60, s. 22. *b* 13 & 14 Vic., c. 60, s. 23.

High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, in the other trustee or trustees of the said stock, Government securities, or thing in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.[a]

When stock, &c., standing in name of deceased person.

24. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall be out of the jurisdiction of the High Court, or cannot be found, or it shall be uncertain whether such executor or administrator be living or dead, or such executor or administrator shall neglect or refuse to transfer such stock or Government securities, or receive the dividends, interest or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, in any person or persons whom the said Court may appoint.[b]

Effect of order vesting legal right to transfer stock, &c.

25. Where any order shall have been made under this Act vesting the right to any stock or Government securities in any person or persons appointed by the High Court, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock and Government securities into his or their own name or names or otherwise, or relating to the receipt of the dividends, interest or income thereof, to the extent and in conformity with the terms of such order.

Obligation to comply with requi-

All companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or

---

a 13 & 14 Vic., c. 60, s. 24. *b* 13 & 14 Vic., c. 60, s. 25.

sitions of person invested.

persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made.

Indemnity.

Termination of powers of person replaced.

After notice in writing of any such order of the High Court concerning any stock or Government securities shall have been given, it shall not be lawful for any company or association, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made, in any matter relating to the transfer of such stock of Government securities, or the payment of the dividends, interest or income thereof.[a]

Effect of order vesting legal right in thing in action.

26. Where any order shall have been made under this Act by the High Court, vesting the legal right to sue for or recover any thing in action, or any interest in respect thereof, in any person or persons, such legal right shall vest accordingly; and therefore it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any suit or other proceeding for the recovery of such thing in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such thing in action.[b]

On neglect to transfer stock, &c., for twenty-eight days, order made vesting right to transfer in such person as Court appoints.

27. Where any person shall neglect or refuse to transfer any stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for or recover any thing in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the High Court for that purpose shall have been

---

[a] 13 & 14 Vic., c. 60, s. 27. [b] 13 & 14 Vic., c. 60, s. 27.

served upon him, it shall be lawful for the said Court to make an order vesting all the right of such person to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.[a]

Similar order on like neglect by executor.

28. When any stock of Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall refuse or neglect to transfer such stock or Government securities, or receive the dividends, interest or income thereof for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, in any person or persons whom the said Court may appoint.[b]

Legal right to transfer stock to vest in person appointed by High Court.

29. When any order being or purporting to be under this Act shall be made by the High Court, vesting the right to any stock or Government securities, or vesting the right to transfer any stock or Government securities, or vesting the right to call for the transfer of any stock or Government securities in any person or persons, in every such case the legal right to transfer such stock or Government securities shall vest accordingly;

Powers of person appointed.

and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock or Government securities into his or their own name or names or otherwise, to the extent and in conformity with the terms of the order.

Obligation to comply with his requisitions.

All companies and associations, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies,

---

a 15 & 16 Vic., c. 55, s. 4. *b* 15 & 16 Vic., c. 55, s. 5.

associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.[a]

Power to make order for transfer, or receipt of dividends, of stock, &c., in name of minor-trustee.

30. When any minor shall be solely entitled to any stock or Government securities upon any trust, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof.

When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, either in the person or persons jointly entitled with the minor, or in him or them together with any other person or persons the said Court may appoint.[b]

When decree made for sale of immoveable property for payment of debts.

31. When a decree or order shall have been made by the High Court directing the sale of any immoveable property for the payment of the debts of a deceased person, every person holding such property, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act:

and the High Court is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.[c]

Holding immoveable property the sale of which has been ordered by High Court.

32. When any decree or order shall have been made by the High Court, whether before or after the passing of this Act, directing the sale of any immoveable property for any purpose whatever, every person holding such property, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and

---

a 15 & 16 Vic., c. 55, s. 6. *b* 15 & 16 Vic., c. 55, s. 3.
c 13 & 14 Vic., c. 60, s. 29.

bound thereby, or being otherwise bound by such decree or order, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act.

Order for vesting estate in lieu of conveyance by party to suit in order to carry out sale.

In every such case, it shall be lawful for the High Court, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such property or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct.

Effect of order.

Every such order shall have the same effect as if the person so holding or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such property for such estate.[a]

Court to declare what parties are trustees of immoveable property comprised in suit, and as to interests of persons unborn.

33. Where any decree or order shall be made by the High Court for the specific performance of a contract concerning any immoveable property, or for the partition or exchange of any immoveable property, or generally when any decree shall be made for the conveyance of any immoveable property, either in cases arising out of the doctrine, of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such property, or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act.

Thereupon it shall be lawful for the High Court to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said Court might, under the provisions of this Act, make concerning the estates, rights and interests of trustees born or unborn.[b]

---

a 15 & 16 Vic., c. 55, s. 1. *b* 13 & 14 Vic., c. 60, s. 30.

34. It shall be lawful for the High Court to make declarations and give directions concerning the manner in which the right to any stock, Government securities or thing in action vested under the provisions of this Act shall be exercised, and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.[a]

Power to direct how right to transfer stock shall be exercised.

35. In all cases in which it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the High Court, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or trustees or not at the time of making such order, and if there be such trustee or trustees, either in substitution for or in addition to him or them.[b]

Power to Court to make order appointing new trustees.

The person or persons who, upon the making of such order shall be trustee or trustees, shall have the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.[c]

Powers of new trustees.

36. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any immoveable property subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the Court shall direct.

Power to Court to invest immoveable property in new trustee.

Such order shall have the same effect as if the person or persons who, before such order, was or were the trustee or trustees (if any) had duly executed all proper conveyances of such property for such estate.

37. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a

Power to Court to vest right to sue in new trustees.

---

a 13 & 14 Vic., c. 60, s. 31. *b* 13 & 14 Vic., c. 60, s. 32.
c 13 & 14 Vic., c. 60, s. 33.

transfer of any stock or Government securities subject to the trust, or to receive the dividends, interest or income thereof, or to sue for or recover any thing in action subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.[a]

Old trustees not discharged from liability.

38. Any such appointment by the High Court of new trustees, and any such conveyance or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee, than an appointment of new trustees under any power for that purpose contained in any instrument would have done.[b]

Who may apply.

39. An order under any of the hereinbefore contained provisions, for the appointment of a new trustee or new trustees, or concerning any immoveable property, stock or Government securities, or thing in action subject to a trust, may be made upon the application of any person beneficially interested in such immoveable property, stock, Government securities or thing in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and an order under any of the provisions hereinbefore contained, concerning any immoveable property, stock, Government securities or thing in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage.[c]

Application may be by petition.

40. When any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, it shall be lawful for him to present a petition to the High Court for such order as he may deem himself entitled to, and he may give evidence by affidavit or otherwise in support of such petition before the said Court, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.[d]

What may be done upon petition.

41. Upon the hearing of any such petition, it shall be lawful for the said High Court, should

---

a 13 & 14 Vic., c. 60, s. 34.
b 13 & 14 Vic., c. 60, s. 36.
c 13 & 14 Vic., c. 60, s. 37.
d 13 & 14 Vic., c. 60, s. 40.

it be deemed necessary, to direct a reference to one of the Judges of the Court to inquire into any facts which require such an investigation, or it shall be lawful for the said Court to direct such petition to stand over, to enable the petitioner to adduce evidence or further evidence before the Court, or to enable notice or any further notice of such petition to be served upon any person or persons.*a*

Court may dismiss petition with or without costs.

42. Upon the hearing of any such petition, it shall be lawful for the High Court to dismiss such petition with or without costs, or to make an order thereupon in conformity with the provisions of this Act.*b*

Power to make order in cause.

43. Whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by report of one of the Judges of the Court, the facts necessary for an order under this Act shall appear to the High Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or application in the said cause or matter, to make such order under this Act.*c*

Orders by High Court founded on certain allegations conclusive evidence of matter contained therein.

44. Whenever any order shall be made under this Act by the High Court, for the purpose of conveying any immoveable property, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee of the heir or devisee of a mortgagee is out of the jurisdiction of the High Court, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir, or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the High Court has made an order upon such an allegation, shall be conclusive evidence of the matter so

---

a 13 & 14 Vic., c. 60, s. 41. *b* 13 & 14 Vic., c. 60, s. 42.
c 13 & 14 Vic., c. 60, s. 43.

alleged in any Court of Civil Judicature upon any question as to the legal validity of the order:

Powers as to re-conveyance of immoveable property, &c.,

Provided always, that nothing herein contained shall prevent the High Court directing a reconveyance of any moveable property conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such property or contingent right, to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.[a]

Trustee of Charity.

45. It shall be lawful for the High Court to exercise the powers herein conferred for the purpose of vesting any immoveable property, stock, Government securities or thing in action in the trustee or trustees of any charity or society, over which charity or society the High Court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court.[b]

Money of minors and persons of unsound mind to be paid into Court.

46. Where any minor or person of unsound mind shall be entitled to any money payable in discharge of any immoveable property, stock, Government securities or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then depending concerning such money, or if there shall be no such cause, to the credit of such minor or person of unsound mind, subject to the order or disposition of the said Court;

and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in Government securities, and to order payment or distribution thereof, or payment of the dividends or interest thereof, as to the said Court shall seem reasonable.[c]

---

a 13 & 14 Vic., c. 60, s. 44. *b* 13 & 14 Vic., c. 60, s. 45.
c 13 & 14 Vic., c. 60, s. 47.

47. Where in any suit commenced or to be commenced in the High Court, it shall be made to appear to the Court that diligent search and enquiry have been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to it to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared at the hearing of such cause:

Court may make decree in absence of trustee.

Provided always, that no such decree shall bind, affect, or in any wise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors or administrators for or in respect of any estate, right or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.[a]

Decree not effective without service of process.

48. Every order to be made under this Act, which shall have the effect of a conveyance of any immoveable property, or a transfer of any such stock, Government securities, or thing in action as can only be transferred by stamped deed, or for the transfer of which a stamp is necessary, shall be chargeable with the like amount of stamp-duty as it would have been chargeable with if it had been a deed executed or a transfer made by the person or persons holding such property or entitled to such stock, Government securities, or thing in action.

Orders under Act chargeable with some stamp-duty as deeds of conveyance.

Every such order shall be duly stamped for denoting the payment of the said duty.[b]

49. The High Court may order the costs and expenses of and relating to the petitions, orders, directions, conveyances and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the immoveable or moveable property, or the rents or

Costs may be paid out of estate.

---

a 13 & 14 Vic., c. 60, s. 49. b 15 & 16 Vic., c. 55, s. 13.

produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court shall think proper.[a]

Power to order enquiry concerning person of unsound mind.

50. Upon any petition being presented under this Act to the High Court concerning a person of unsound mind, it shall be lawful for the said Court to make an order directing an enquiry whether such person is or is not of unsound mind, and incapable of managing himself and his affairs.

Effect of order.

Such order shall have the same effect as the like order made under section 1 of Act XXXIV of 1858 (*to regulate proceedings in Lunacy in the Courts of Judicature established by Royal Charter*), and the enquiry directed to be made shall be made in all respects in the manner declared and prescribed for making an enquiry under the last-mentioned Act.

Postponement of order pending enquiry.

The High Court may postpone making any order upon the petition presented as aforesaid, until any enquiry so directed to be made shall have been finally concluded.[b]

Suit may be directed.

51. Upon any petition under this Act being presented to the High Court, it shall be lawful for the said Court to postpone making any order upon such petition, until the right of the petitioner shall have been declared in a suit duly instituted for that purpose.[c]

Indemnity to persons obeying orders under Act.

52. Every order made or purporting to be made under this Act by the High Court shall be a complete indemnity to all persons whatsoever for any act done pursuant thereto; and it shall not be necessary for such persons to enquire concerning the propriety of such order, or whether the High Court has jurisdiction to make the same.[d]

Execution and effect of orders.

53. Any order made by the High Court under this Act shall have the same effect and be executed in the same manner as a decree.

Short title.

54. This Act may be cited as "The Indian Trustee Act, 1866."

---

a 13 & 14 Vic., c. 60, s. 51.
b 13 & 14 Vic., c. 60, s. 52.
c 13 & 14 Vic., c. 60, s. 53.
d 15 & 16 Vic., c. 55, s. 7.

THE TRUSTEES AND MORTGAGEES' POWERS ACT, 1866.

No. XXVIII of 1866.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 24TH OCTOBER 1866.

An Act to give Trustees and Mortgagees and others, in cases to which the English law is applicable, certain powers now commonly inserted in Settlements, Mortgages and Wills, and to amend the Law of property and relieve Trustees.

Preamble.

WHEREAS it is expedient that in cases to which English law is applicable, certain powers and provisions usually inserted in settlements, mortgages, wills and other instruments, should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument, and that in such cases trustees should be relieved; It is enacted as follows:—

(*a*) The provisions of this Act have been extended to Hindoos *In re* Kahandas Narrandas, I. L. R., 5 B. 154. It has been declared to apply to the whole of British India except the scheduled districts by and in Act No. XV of 1874. Sections 2, 3, 4, 5, 32, 33, 34, 35, 36 and 37 have been repealed with respect to Madras, the North-West Provinces and Punjab and in the territories administered by the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam by the Indian Trusts Act, 1882. The new law was founded upon the English Statutes 22 & 23 Victoria, c. 35. (The Trustees Relief Amendment Act) and 23 & 24 Victoria, c. 145. The Trustees and Mortgagees Act.

Interpretation clause.

1. In the construction of this Act, unless there be something repugnant in the subject or context—

"Immoveable property."

"Immoveable property" shall include land, any benefit to arise out of land, and things attached to the earth or permanently fastened to any thing which is attached to the earth:

"Mortgage."

"Mortgage" shall be taken to include every instrument by virtue whereof immoveable property is in any manner conveyed, pledged or charged as security for the repayment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt:

"Mortgagor."

"Mortgagor" shall be taken to include every person by whom any such conveyance, pledge or charge as aforesaid shall be made:

"Mortgagee."

"Mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, pledge or charge as aforesaid is made or transferred: and

"High Court."

"High Court" means any Court established or to be established under Statute 24 & 25 Vic., cap. 104, and includes the chief Court of the Punjab.

Powers of Trustees for Sale, &c., and Trustees of renewable Leaseholds.

Trustees empowered to sell, may sell in lots, and either by public auction or private contract.

2. In all cases where, by any will, deed or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any immoveable property named or referred to in, or from time to time subject to, the uses or trusts of such will, deed or other instrument, it shall be lawful for such trustees or other persons, whether such property be invested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times.[a]

---

a 23 & 24 Vic., c. 145, s. 1.

3. It shall be lawful for the persons making any such sale to insert any such special or other stipulations, either as to the title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as they shall think fit; and also to buy-in the property or any part thereof at any sale by auction, and to rescind or vary any contract for sale, and to resell the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby;

Sale may be made under special conditions, and trustees may buy-in, &c.

and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular reinvestment of the purchase-money in the purchase of any other property or otherwise.[a]

4. For the purpose of completing any such sale as aforesaid, the persons empowered to sell as aforesaid shall have full power to convey or otherwise dispose of the property in question, in such manner as may be necessary.[b]

Trustees exercising power of sale, &c., empowered to convey.

5. The money so received upon any such sale as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale;

Money arising from sales, to be laid out in manner indicated in will, &c.

and until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities for the benefit of such persons as would be entitled to the benefit of the money, and the interest and profits thereof, in case such money were then actually laid out as aforesaid:

Until so laid out, money to be invested in Government securities.

Provided that if the will, deed or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid would have been payable or applicable in case such sale had not been made.[c]

---

a 23 & 24 Vic., c. 145, s. 2. *b* 23 & 24 Vic., c. 145, s. 3.
c 23 & 24 Vic., c. 145, s. 4.

Powers of Mortgagees.

6. Where any principal-money is secured or charged by deed, on any immoveable property, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal-money shall have become payable, according to the terms of the deed, or after any interest on such principal-money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely :—

Powers incident to mortgages.

1st, a power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy-in and resell the property, from time to time, in like manner.

2nd, a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.[a]

7. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred, shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.[b]

Receipts for purchase-money sufficient discharges.

8. No such sale as last aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property ;

Notice to be given before sale ;

but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had

but purchaser relieved from enquiry as to circumstances of sale.

---

a 23 & 24 Vic., c. 145, s. 11. *b* 23 & 24 Vic., c. 145, s. 12.

been given; but any person damnified by any such unauthorized exercise of such power, shall have his remedy in damages against the person or persons selling.[a]

Application of purchase-money.

9. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows:—

first, in payment of all expenses incident to the sale or incurred in any attempted sale;

secondly, in discharge of all interest and cost then due in respect of the charge in consequence whereof the sale was made; and

thirdly, in discharge of all the principal-monies then due in respect of such charge;

and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators or assigns, as the case may be.[b]

Conveyance to purchaser.

10. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of:

Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee simple of the property comprised therein in cases where the mortgagor could have disposed of such fee simple at the date of the mortgage.[c]

Owner of charge may call for title-deeds and conveyance of legal estate.

11. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed or surrendered to and were then vested in him for all the estate

---

a 23 & 24 Vic., c. 145, s. 13. *b* 23 & 24 Vic., c. 145, s. 14.
c 23 & 24 Vic., c. 145, s. 15.

and interest which the person creating the charge had power to dispose of;

and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.[a]

Appointment of receiver.

12. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid, may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.[b]

No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

Receiver deemed agent of mortgagor.

13. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.[c]

Powers of receiver.

14. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property of which he is appointed receiver, by suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.[d]

---

a 23 & 24 Vic., c. 145, s. 16.
b 23 & 24 Vic., c. 145, s. 17.
c 23 & 24 Vic., c. 145, s. 18.
d 23 & 24 Vic., c. 145, s. 19.

Receiver may be removed, and new receivers appointed.

15. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.[a]

Receiver to receive commission not exceeding five per cent.

16. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five *per centum* on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount.[b]

Receiver to insure if required.

17. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge which is in its nature insurable.[c]

Application of moneys received by him.

18. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any; and in the next place in payment of all the interest accruing due in respect of any principal-money then charged on the property over which he is receiver, or on any part thereof; and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators, or assigns.[d]

This part to relate to charges by way of mortgage only.

19. The powers and provisions contained in sections 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.[e]

---

a 23 & 24 Vic., c. 145, s. 20.
b 23 & 24 Vic., c. 145, s. 21.
c 23 & 24 Vic., c. 145, s. 22.
d 23 & 24 Vic., c. 145, s. 23.
e 23 & 24 Vic., c. 145, s. 24.

Leases.

Restriction on effect of license to alien.

20. Where any license to do any act which without such license would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall, at any time after this Act comes into operation, be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license);

and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.[a]

Restricted operation of partial licenses.

21. Where in any lease heretofore granted or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or under-letting, or doing any other specified act without license, and a license at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or under-let his share or interest, or to do any other act prohibited to be done without license; or shall be given to any lessee or owner, or any one of several lessees or owners to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares

[a] 22 & 23 Vic., c. 35, s. 1.

or interests or remaining property, but such right of re-entry shall remain in full force, over or in respect of the shares or interests or property not the subject of such license.[a]

Apportionment of conditions of re-entry in certain cases.

22. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.[b]

Rent-charges.

Release of part of land charged, not an extinguishment.

23. The release from a rent-charge of part of the immoveable property charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the property released, without prejudice nevertheless to the rights of all persons interested in the property remaining unreleased, and not concurring in or confirming the release.[c]

Powers.

Mode of execution of powers.

24. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity:

Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a

---

a 22 & 23 Vic., c. 35, s. 2. *b* 22 & 23 Vic., c. 35, s. 3.
c 22 & 23 Vic., c. 35, s. 10.

valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument:

And nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.[a]

Legatee in trust may raise money by sale, notwithstanding want of express power in will.

25. Where by any will which shall come into operation after the passing of this Act, the testator shall have charged his immoveable property or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have bequeathed the property so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such property, it shall be lawful for the said legatee or legatees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid by sale and absolute disposition by public auction or private contract, of the said property or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other;

and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.[b]

Powers given by last section extended to survivors, legatees, &c.

26. The powers conferred by the last preceding section shall extend to all and every person or persons in whom the property bequeathed in trust shall for the time being be vested by survivorship, or under the laws relating to intestate or testamentary succession, or to any person or persons who may be appointed under any power in the will, or by the High Court, to succeed to the trusteeship vested in such legatee or legatees in trust as aforesaid.[c]

---

a 22 & 23 Vic., c. 35, s. 12. *b* 22 & 23 Vic., c. 35, s. 14.
c 22 & 23 Vic., c. 35, s. 15.

27. If any testator who shall have created such a charge as is described in section 25 of this Act, shall not have bequeathed the property charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors (if any) for the time being named in such will, shall have the same or the like power of raising the said moneys as is hereinbefore vested in the legatee or legatees in trust of the said property and such power shall from time to time devolve on and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested.[a]

Executors to have power of raising money, &c., where no sufficient bequest.

28. Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by sections 25, 26 and 27 of this Act, or any of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.[b]

Purchasers, &c., not bound to enquire as to powers.

Inheritance.

29. In cases of intestacies occurring before the first day of January, 1866, where there shall be a total failure of heirs of the purchaser, or where any immoveable property shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such an ancestor, then and in every such case the property shall descend, and the descent shall thenceforth be traced, from the person last entitled to the property as if he had been the purchaser thereof.[c]

Descent how traced.

This section shall be read as part of Act No. XXX of 1839[d] *for the amendment of the law of inheritance.*[e]

Assignment of moveables and terms for years.

30. Any person shall have power to assign moveable property now by law assignable, terms for years of immoveable property, and estates by *elegit*, directly to himself and another person or other persons or cor-

Assignments to self and others.

---

a 22 & 23 Vic., c. 35, s. 16.
b 22 & 23 Vic., c. 35, s. 17.
c 22 & 23 Vic., c. 35, s. 19.
d Repealed, except as to descents before 1866, by Act No. VIII of 1868.
e 22 & 23 Vic., c. 35, s. 20.

poration, by the like means as he might assign the same to another.[a]

Purchasers.

Not bound to see to application of purchase-money, &c.

31. The *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage-money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication, thereof.[b]

Investment of Trust-funds.

On what securities trust-funds may be invested.

32. Trustees having trust-money in their hands which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature:

Provided always, that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person.[c]

Trustees and Executors.

Trustees may apply income of property of minors, &c., for their maintenance.

33. In all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the

---

a 22 & 23 Vic., c. 35, s. 21.

b 22 & 23 Vic., c. 35, s. 23, omitting the limiting clause "unless the contrary shall be expressly declared by the instrument creating the trust or security."

c 23 & 24 Vic., c. 145, s. 25.

income to which such minor may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not;

and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen:

Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.[a]

Provisions for appointment of new trustees, on death, &c.

34. Whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable, to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator, of the last surviving and continuing trustees, or for the retiring trustees, if they shall all retire simultaneously, or for the last retiring trustee, or where there are two or more classes of trustees of the instrument creating the trust, then for the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur (and for this purpose any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee), by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or being absent from British India, or desiring to be

[a] 23 & 24 Vic., c. 145, s. 26.

discharged, or refusing or becoming unfit or incapable to act as aforesaid.

Transfer of trust-property to new trustees.

So often as any new trustee or trustees shall be so appointed as aforesaid, all the trust-property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall with all convenient speed be conveyed and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.

Powers, &c., of new trustees.

Every new trustee to be appointed as aforesaid, as well before as after such conveyance or transfer as aforesaid, and also every trustee appointed by any High Court, either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will or other instrument (if any) creating the trust.[a]

Appointment of Official Trustee to be a trustee.

The Official Trustee may with his consent, and by the order of the High Court, be appointed under this section in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

Appointment in place of trustee pre-deceasing testator.

35. The power of appointing new trustees hereinbefore contained, may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.[b]

Trustees' receipts to be discharges.

36. The receipts in writing of any trustees or trustee for any money payable to them or him by reason, or in the exercise, of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.[c]

---

[a] 23 & 24 Vic., c. 145, s. 27. [b] 23 & 24 Vic., c. 145, s. 28.
[c] 23 & 24 Vic., c. 145, s. 29.

37. Every deed, will or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say,

Every trust-instrument deemed to contain clauses for indemnity and reimbursement of trustees.

"that the trustees or trustee for the time being of the said deed, will or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, not for any banker, broker or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default, respectively; "and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust-premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument."[a]

38. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.[b]

Executors may compound, &c.

39. No trustee, executor or administrator making any payment or doing any act *bonâ fide* under or in pursuance of any power-of-attorney, shall be

Trustee, &c., making payment

---

a 22 & 23 Vic., c. 35, s. 31. b 23 & 24 Vic., c. 145, s. 30.

under power-of-attorney, not liable by reason of death or party giving power.

liable for the moneys so paid or the act so done, by reason that the person who gave the power-of-attorney was dead at the time of such payment or act, or had done some act to avoid the power:

Provided that the fact of the death, or of the doing of such act as last aforesaid, as the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor or administrator, was not known to him:

Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made; but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor or administrator, if the money had not been paid away under such power-of-attorney.[a]

As to liability of executor or administrator in respect of rents, covenants or agreements.

40. Where an executor or administrator liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned, whether before or after the passing of this Act, to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease, or agreement for a lease, as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively, without appropriating any part, or any further part (as the case may be), of the estate of the deceased to meet any future liability under the said lease or agreement for a lease.

The executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement

---

a 22 & 23 Vic., c. 35, s. 26.

for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease.

Nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow to assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.[a]

As to liability of executor, &c., in respect of rents, &c., in conveyance on rent charge.

41. In like manner, where an executor or administrator liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of such estate to meet any future liability under the said conveyance or agreement for a conveyance.

The executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance.

Nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of

[a] 22 & 23 Vic., c. 35, s. 27.

the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.[a]

As to distribution of assets of testator or intestate after notice given by executor and administrator.

42. Where an executor or administrator shall have given such or the like notices, as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the High Court in an administration-suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be.

Nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.[b]

Trustee, executor, &c., may apply by petition to Judge of High Court for opinion, advice, &c., in management, &c., of trust property.

43. Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice or direction of such Judge on any question respecting the management or administration of the trust-property or the assets of any testator or intestate.

Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient.

The trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject-matter of the said application:

---

a 22 & 23 Vic., c. 35, s. 28. *b* 22 & 23 Vic., c. 35, s. 29.

Provided nevertheless, that this Act shall not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction: and the costs of such application as aforesaid shall be in the direction of the Judge to whom the said application shall be made.[a]

General Provisions.

Tenants for life, &c., may execute powers, notwithstanding incumbrances.

44. For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of immoveable or moveable property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent: but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.[b]

Operation of Act.

45. The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil or other instrument executed after this Act comes into operation, or under a will or codicil confirmed or revived by a codicil executed after that date,[c] and only to property in British India and to cases to which English law is applicable.

Short title.

46. This Act may be called "The Trustees and Mortgagees' Powers Act, 1866."

---

a 22 & 23 Vic., c. 35, s. 30. b 23 & 24 Vic., c. 145, s. 31.
c 23 & 24 Vic., c. 145, s. 34.

Conveyance of an estate in India upon trust for sale with a declaration of Trust of the purchase money by reference to a settlement of even date. Special powers of leasing and management until sale.

THIS INDENTURE made this

1. *Parties.* day of in the year BETWEEN A. B. of [The settlor] of the one part & C. D. of E. F. of G. H. of [The trustees] of the other part.

2. *Witnesseth.* WITNESSETH that for divers good considerations A.B. doth grant and convey unto the

3. *Grant.* said C. D., E. F. & G. H. ALL THAT estate

4. *Parcels.* known as the village of in the district of and province of Bengal in India being as borne upon the books of the collectorate 4,000 Begahs more or less AND ALL other the lands (if any) tenements and hereditaments of or belonging to or disposable by the said A. B. situate in or issuing out of the said districts of or any part

5. *General Words [for an Indigo Plantation.]* thereof together with [All ways, paths, passages, wells, tanks, ponds, reservoirs, waters, lands, covered with water, water-courses, trees, woods, underwoods, and the ground and soil thereof and all elephants, horses, and buffaloes and all other cattles, carts, carriages, goods, wares, chattels, and merchandises whatsoever in and upon or belonging to the said several and respective indigo factories or sets of works, lands, hereditaments and premises or any part thereof and all indigo weed, plant and crop growing and to be grown upon the lands belonging to the said several and respective indigo factories and works or on any other

lands for the purpose of being made and manufactured into indigo thereat; and all indigo or produce to be made or manufactured therefrom or at or for the said several factories or concerns; and all balances sum or sums of money, bonds, kubbooliats and other securities for the payment of money due or to become due and owing by ryots or other persons to the said several and respective indigo factories or sets of works and the owners and proprietors thereof and all and all manner of other rights, liberties, profits, privileges, easements, emoluments and advantages, appendages and appurtenances whatsoever to the said several and respective indigo factories or works, talooks, mowjalis, villages, lands, hereditaments and premises or any part or parts thereof belonging or in anywise appertaining with full power and authority to recover (power of attorney to recover and give receipt for the premises)] AND ALL the estate, right, title, claim and demand of the said A. B. into and upon the

6. *Habendum.* said premises To Have and to hold the said premises hereinbefore expressed to be hereby conveyed (subject to the estates and interests of the lessees, tenants and occupiers of the same premises or any part or parts thereof respectively unto the said C. D., E. F. & G. H. and their assigns UPON TRUST that they

7. *To the Trustees.* the said C. D., E. F. & G. H. or the survivors or survivor thereof or the executor of such survivor shall without any further consent on the part of the said A. B. and at such times and time during her lifetime, or after her death

8. *Upon trust for sale.* as the said trustees or trustee shall think fit, sell the said premises, &c.

9. *Trusts of proceeds.*

10. *By reference to settlement of even date.*

[There may properly follow—

11. *Power of leasing and management till sale.*

12. *Power to trustees to appoint agents.*
13. *Power to trustees to appoint Attornies and act by delegation.*
14. *Exemption of trustees from liability for acts of their delegates.*
15. *Power to appoint new trustees.*
16. *Authority to trustees to charge for transacting the business of the trust.*
17. *Appointment of attornies to register the deed in India.*]

Signatures and Seals.

Plaint and Prayer for the Execution of Trusts.

In the Court of at
Civil Suit No.

A. B. of Plaintiff.

against

C. D. of the beneficiary
or one of the beneficiaries Defendant.

A. B. the abovenamed plaintiff states as follows:—

1. That he is one of the trustees under a settlement bearing date on or about the day of made on the marriage of E. F. & G. H. the father and mother of the defendant [or an instrument of assignment of the estate and effects of E. F. for the benefit of the defendant and others the creditors of E. F.

2. The said A. B. has taken upon himself the burden of the said trust and is in possession of [or of the proceeds of] the moveable and immoveable property conveyed [or assigned] by the before mentioned deed.

3. The said C. D. claims to be entitled to a beneficial interest under the before mentioned deed.

4. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of or part of the said moveable property or the profits accruing to the plaintiff as the said trustee of the trust]; and he prays that the Court will take the accounts of the said trust

and also that the whole of the said trust estate may be administered by the Court for the benefit of the said C. D. the defendant and all other persons who may be interested in the said administration in the presence of the said C. D. and such other persons so interested as the Court may direct, or that the said C. D. may show good cause to the contrary.

Code of Civil Procedure, 4th Schedule, No. 108.

Where the suit is by a beneficiary the plaint may be modelled *mutatis mutandis* on the plaints by a legatee, see forms Griffith's Code of Civil Procedure, 4th Schedule, Nos. 105, 106, 107.

INDIAN PENAL CODE,

Act XLV of 1860.

Of Criminal Breach of Trust.

Section 405. "Whoever being in any manner entrusted with property or with any dominion over property dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribed by the mode in which such trust is to be discharged or of any legal contract express or implied which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust."

Illustration (*a*)

A being executor of the will of a deceased person dishonestly disobeys the law which directs him to divide the effects according to the will and appropriates them to his own use. A has committed criminal breach of trust.

Illustrations b, *c*, *d* and *e* relate to trusts connected with agency, bailments and public office and do not fall within the definition of a trust laid down in the Indian Act of 1882.

"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly."—*Indian Penal Code*, s. 24.

Section 406. "Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years or with fine or both."

The two descriptions of imprisonment are—

(1.) Rigorous, that is with hard labour.

(2.) Simple.

The question has been started whether the breach of an implied trust is criminal. The better opinion seems to be that

when a party knew that he was holding property under a trust and wilfully violated that trust intending to defraud, he is guilty of criminal breach.

Section 407. "Whoever being intrusted with property as a carrier, wharfinger or warehouse-keeper commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Section 408. "Whoever being a clerk or servant, or being employed as a clerk or servant and being in any manner entrusted in such capacity with property, or with dominion over any property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

JACKSON
MEMORIAL
COLLECTION.
ROYAL ASIATIC SOCIETY

INDEX.

ABSENCE OF TRUSTEE, 231

ABSOLUTE GIFT, 40

ACCEPTANCE OF TRUST, 10
- acts of, 14
- executor, 14
- liability without, 15
- words of, 53

ACCOUNT
- trustee must, 91

ACQUIESCENCE, 79, 179

ACQUISITION
- of trust property wrongfully, 127

ACTION
- thing in, 233

ADMINISTRATOR-GENERAL
- may be official trustee, 202

ADVANCEMENT, 148, 149

ADVANTAGE GAINED BY FIDUCIARY, 170

ADVICE OF HIGH COURT JUDGE, 250

AGENT
- criminal breach, 256
- for sale, 180, 182

ALIEN, 24—26
- creator of a trust, 45
- trustee, 52

ALIENATION
- by benamidar

ANCESTRAL PROPERTY
- sale of Hindoo, 184
- Mahommedan, 185

APPLICATION OF PURCHASE MONEY, 244

APPOINTMENT OF NEW
- trustee, 131
- karta, 133
- mutwalli, 133
- by Court, 134, 227, 228
- who may apply, 228
- on petition, 228
- in cause, 229
- under deed or will, 245

ASSETS, 14
- advice as to administration, 250
- following by grantor, 249

ATTORNEY
- notice, 116
- purchasing from client, 175

AUCTION
- sale by, 95
- special conditions, 97

AUTHOR OF TRUST, 45

BANKER, 60

BENAMI, 151—154
- advancement, 148

BENEFICIARY, 51
- corporation, 51
- convict, 52
- infant, 52
- alien, 52
- sui juris, 65
- rights and liabilities of, 111—130
- *See* DUTIES OF TRUSTEES.

BENGAL
- father, 71

BONÂ FIDE (GOOD FAITH) PURCHASE, 198

BREACH OF TRUST, 11
See TRUSTEE, DUTIES AND LIABILITIES.
Criminal breach, 256

BROKER, 61

CAPACITY, 47
of married women, 49

CESTUI QUE TRUST.
See BENEFICIARY.

CHARITABLE TRUSTS, 4
official trustee, 203
conveyance, transfer by Court, 230

CHILD, 81
benami, 151—154

CODE
use and abuse of, 29—30

COMPANIES
requisitions of, transferee, 222

COMPROMISE, 167

CONCISE SUMMARY, 8

CONTRACT ACT, 16

CONTRIBUTION, 80, 85

CONVEY, 212

CO-EXECUTOR, CO-TRUSTEE, 84—86
See TRUSTEE.

CONDITIONS OF SALE, 95, 97
See VENDOR AND PURCHASER.

CONFIRMATION, 122

CONSIDERATION
valuable, bonâ fide purchaser for, 198

CONSTRUCTIVE TRUST, 141—145, 195
assets of deceased person, 144
notice, 141
lien for purchase money, 142—196
alienations of trust property, 143

CONSTRUCTIVE TRUST—*contd.*
use of fiduciary position, 143
repairs and improvements, 144
cohabitation, 144
frauds, 144
fiduciary position, 171—179
undue influence, 186—191
qualified owner, 191—193
generally, 198

CONTRACT
in equity, 159—169
rescission of, 156—158

CONTRIBUTION, 85

CONVERSION
of perishable property, 66

CONVERTED TRUST PROPERTY, 122

CONVEYANCE
High Court, 214—218
trustee out of jurisdiction, &c., 216
on trusts of a settlement, 252—254

COPIES, 113

CORBAN, 3

CORPORATION, 46—51

COSTS, 106, 108

CO-TRUSTEE, 84—86, 107

COUNSEL, 187

COUNSEL AND CLIENT

COURT
See DECREE.

CREATION OF TRUST, 38

CREDITORS
deed, 150
compounding for secret advantage, 194

CRIMINAL BREACH, 256

DEBTOR, CREDITORS REPRESENTATIVE, 170

DEBTS AND LEGACIES, 39
charge of, 102

DECREE
effect on powers of trustee, 103, 231

DECREE—*continued*
for specific performance, 163
for reconveyance to beneficiary, 183
for sale for payment of debts, 224

DEFINITIONS
trust, 10
beneficiary, 10
duty, 56
liability, 56
law, 56
mistake, 166
immoveable property, 211
stock, 211
heir devisee, 213
mortgage, 234

DELEGATION, 104—107

DESIRE, 89

DIRECTORS, 177
religious, 187

DISAGREEMENT, 94

DISCHARGE OF TRUSTEE, 131
petition, 131

DISCLAIMER
deed of, 54
arts of, 54
See ACCEPTANCE.

DISCRETION
control of, 108

DISTRIBUTION OF ASSETS, 250

DURATION OF TRUST, 135—141

DUTIES OF TRUSTEES
definition of duty, 56
See TRUSTEE.

ENGLISH TRUSTS
origin and history, 12, 13

EQUITABLE INTEREST
assignment, 114

ESTOPPEL, 42

EVIDENCE, 30—37, 229

EXECUTOR, 64
power to borrow, 64
duty to convert, 67
may compound, 247

EXECUTOR—*continued*
liability as to rent and agreements, 248—250

EXECUTORY TRUST, 44

EXPECTANT HEIRS
dealings with, 195

EXPENSES
trustees remedy, 180

EXTRINSIC EVIDENCE, 152—154

FAMILY
council, 133
arrangements, 169

FAMILY ESTATE, LOANS TO, 184

FIDUCIARY TAKING ADVANTAGE
agent of foreign Government, 171
guardian, 172
mortgagee, 173
trustee, 174, 175
solicitor, 175—177, 178
promoters of Company, 177
Government officer, 179

FORFEITURE, 50

FORMS AND PRECEDENTS
conveyance on family trusts, 252—254
plaint and prayer for execution of trusts, 254, 255
See DECREES.

FRAUD, 166, 171—186

GENERAL CLAUSES ACT, 16

GIFT
trust and power, 43
subject to a trust, 44

GOVERNMENT
securities, *see* INVESTMENT
transfered by Court, 220—222
Hindu widow or female heir, 70

HOPING, 39

IGNORANCE
See ACQUIESCENCE.

ILLEGAL PURPOSE, 155

ILLUSTRATIONS
use and abuse of, 29

IMPERATIVE, 39

IMPERFECTIVE TRANSFER, 42

IMPLIED TRUSTS, 38, 145—150
on written instruments, 39
charge of legacies, 39
covenant to purchase, 39
to settle, 39
surplus of devise, 39
"what is agreed to be done," 147
advancement, 148

INCAPACITY
to create trust, 45

INDEMNITY, 87, 90, 101, 121

INFANT, 81, 210
payment of money into Court, 230

INJUNCTION
against trustee, 120

INQUIRIES
as to soundness of mind, 230

INSPECTION OF ACCOUNTS, 112

INTENTION, 39

INVESTMENTS, 72—75
proper modes, 72
mortgages under Land Improvement Act, 73
deposit in Government Saving's Bank, 75

JURISDICTION
submission to, 65

JUSTINIAN, 11, 12

KARTA, 14, 71, 113, 184

LACHES OR DELAY, 78, 90

LAND IMPROVEMENT ACT, 92

LIABILITY
definition, 56

LIEN FOR UNPAID PURCHASE MONEY, 142, 196

LIMITATION, 82, 83, 90, 137

LIQUIDATION TRUSTEE, 94

LUNATIC, 46, 210, 213

MAINTENANCE AND EDUCATION, 99

MAJORITY, 94

MARRIAGE SETTLEMENT
collaterals, 197
married woman, 77
masâlik i-âmma, 2

MISREPRESENTATION, 157

MISTAKE, 166
rectification of instruments, 169

MITAKSHARA
father, 71

MORAL NECESSITY, 107

MORTGAGES, 219

MORTGAGEES
powers of, 236—238

NEGLECT

NEGLIGENCE, 15

NEW TRUSTEE
See APPOINTMENT.

NOTICE, 115, 116, 193, 194
good faith purchaser without notice, 126

OFFICIAL TRUSTEE, 4, 201—210
in each presidency, 202
appointment, 202
Administrator-General may be, 202
may be trustee of settlement at instance of settlor, 203
may be trustee of other trusts, 203
always sole trustee, 204

OFFICIAL TRUSTEE—*continued.*
investments, 205
to sue or be sued by name of office, 206
separate account of each trust, 206
annual schedules, 207
auditors, 207—209
may be transferee of legacies or shares of infants and lunatics, 210

OPERATION OF LAW

ORDER OF COURT
Vesting immoveable property, 216, 218, 226
legal right to transfer stock, 222, 233
appointing new trustees, 227, 228
conclusive evidence, 229

OUDH ESTATES ACT, 8

PAROL EVIDENCE
use of, 39, 166
to control documents, 152—154

PARTNER
employing trust property, 127
property of, 149, 150, 179

PERISHABLE PROPERTY, 66

PERPETUITIES, 17

PERSON IN LAW, 46

PETITION
See APPOINTMENT.

PLAINT FOR EXECUTION OF TRUSTS, 254

POWERS
of new trustees, 135

PRECATORY WORDS, 39

PREVENTION OF BREACH, 119

PRINCIPAL CIVIL COURT, 50

PRIZES OF WAR, 4—6

PROMOTERS OF COMPANY, 177

PROOF, 30—37

PROPERTY
following, 122
blended, 127
purchase on trust, 194

QUALIFIED OWNER GETTING AN ADVANTAGE, 191—193

QUASI TRUSTEE
obligations, 197

RATIFICATION, 122

RECEIPTS
of trustees of purchase money, 244
discharge purchaser, 244

RECEIVER, 117
under mortgage, 238, 239

RECOMMENDATION, 39, 40

RECTIFICATION OF INSTRUMENTS, 169, 170

REFUSAL
See DISCLAIMER.

REGISTRATION, 33

RELINQUISHMENT

REMEDY
of beneficiary, 117—130

REPEAL OF ENACTMENTS, 9, 10

REQUESTING, 39

RESULTING TRUST, 124, 154

RETAINER OF TRUST FUNDS, 81

RIGHT, 87

SALE, 76, 99
payment of money, 100

SECRET TRUSTS, 37
See UNLAWFUL.

SERVICES TRUSTEES
no charge for, 108

SHEBAIT, 184

SPECIAL CASE

SPECIAL TRUST LEGISLATIVE ACTS, 7, 8

SPECIFIC PERFORMANCE, 159—166

STOCK, 211, 220

TENANT FOR LIFE, 67, 69, 183—186, 251

TRANSFER OF PROPERTY, 22, 32, 124, 123, 212, 214
pursuant to rescinded contract, 156

TRANSFEREE IN GOOD FAITH, 124
from beneficiary, 130

TRUST
creation of, 16
definition, 10
in Hindu law, 13
foreign, 24—28
unlawful, 17
express, 31
before the Trust Act, 33
secret, 34—37
executory, 45

TRUST WHO MAY CREATE, 47—50
for payment of debts, 63
survival of, 135
extinction, 135—140
revocation, 140

TRUSTEE
government refuses to be, 45
who may be, 52
aliens, 53
females, 53
corporations, 53
duties and Liabilities, 55—87
state of property, 58
protection of title, 58, 60
care requisite, 60—65
as to agent, 62, 241
policy of assurance, 63
impartiality, 68
to prevent waste, 69

TRUSTEE—*continued.*
accounts and information, 71
investments, 72—75
sale, 76
liability of, for breaches, 77
loss of property, 78
interest, 77
delay, 78
acquiescence of beneficiary, 79
predecessors default, 80
beneficiary party, 81, 129
co-trustee, 84, 85, 86
paying without notice of transfer, 87
forfeiture by beneficiary, 87
indemnity, 87
Rights and Powers
title deeds, 88
expenses, 88
erroneous overpayments, 89
costs, 90
opinion of Court, 91
settlement of accounts, 91
landlords, 92, 94
discretion, 93
sale, 95—97
conveyance, 98
varying investments, 98
maintenance, 98
receipts, 100
compounding, 100
suspension of powers, 103
Disabilities
renunciation, 104
delegation, 104
charge profit loan, 104
sale purchase, 108—110
removal of, 118, 119
discharge of, 131

TRUSTEE ACT, 211—232
extended to Hindoos, 211

TRUSTEES AND MORTGAGEES POWERS ACT, 233—251
extended to Hindoos, 232

UNAUTHORIZED INVESTMENT, 123

UNDIVIDED HINDOO FAMILY, 4

UNDUE INFLUENCE, 186—191
religious director, 187—189
solicitor, 190
guardian and ward, 189
age, 191
testators, 190

UNLAWFUL TRUSTS, 17—24

UNSOUND MIND
order, to enquire as to, 230
payment of money into Court, 230

VACATING OFFICE, 130

VENDOR AND PURCHASER
relation of, 180, 182—185

VESTING ORDER, 134

VOUCHERS, 112

VOWS, 3

WAQF, 2

WARDS,
court of, 92

WASTE, 69

WIDOW, 70

WIFE, 77

WILL,
trusts by, 33—37
circumstances, 41

WILLING AND DESIRING, 39

WISHING AND REQUESTING, 39

WORDS AND THEIR INTERPRETATION
trust, 10
author of trust, 10
beneficiary, 11
trust property, 11
instrument of trust, 11
registered, 11
notice, 11
other expressions, 11
See DEFINITIONS.

WRITING, 32—34

WUJUH-UL
birrwal-ihsan, 2
khair, 2

00087177

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018